Office-Supreme Court, U.S.
FILED
SEP 20 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 590

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,
Petitioner,

and

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WARNER W. GARDNER
LAWRENCE J. LATTO
WILLIAM H. DEMPSEY, JR.
734 Fifteenth Street, N.W.
Washington, D.C. 20005

BERNARD KOTEEN
ALAN Y. NAFTALIN
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

RICHARD F. WOLFSON
316 N. Miami Ave.
Miami, Florida
Attorneys for Petitioner.

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

KOTEEN & BURT
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting The Writ	6
1. "Case or Controversy."	7
2. Statutory Scope of Review	11
3. Related Decisions of the Court of Appeals	16
Appendix A	23
Appendix B	37
Appendix C	49
Appendix D	79

CITATIONS

Cases:

Altvater v. *Freeman*, 319 U.S. 359	8
Anti-Fascist Committee v. *McGrath*, 341 U.S. 123	7
Ashbacker v. *FCC*, 326 U.S. 327	12
Board v. *Hearst Publications*, 322 U.S. 111	13
California v. *San Pablo, Etc. R.R.*, 149 U.S. 308	8
Century Broadcasting Corp. v. *FCC*, 310 F.2d 864 (C.A.D.C. 1962)	12
Citizens Television Protest Committee v. *FCC*, —— F.2d —— (May 7, 1965)	17
Civil Aeronautics Board v. *Delta Air Lines, Inc.*, 367 U.S. 316	15
Communications Comm'n v. *N.B.C.*, 319 U.S. 239	8
Communications Comm'n v. *WJR*, 337 U.S. 265	11, 17
Communications Comm'n v. *WOKO*, 329 U.S. 223	11
Continental Southern Lines, Inc. v. *CAB*, 197 F.2d 397 (C.A.D.C., 1952), *cert. den.*, 344 U.S. 831	9
Cover v. *Schwartz*, 133 F.2d 541 (C.A. 2, 1942)	9
Electric Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241	8, 9

Page

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 ..... 11, 17, 19, 20
FCC v. *Schreiber*, 381 U.S. 279 ..... 6, 11, 12, 13, 17
Federal Radio Commission v. *General Electric Co.*, 281 U.S. 464 21
Federal Radio Comm'n v. *Nelson Bros. Co.*, 289 U.S. 266 7
Fleming v. *FCC*, 225 F.2d 523 (C.A.D.C., 1955) 16
FPC v. *Idaho Power Co.*, 344 U.S. 17 16
Glidden Company v *Zdanok*, 370 U.S. 530 ..... 7, 20
Gordon v. *United States*, 2 Wall. 561 (117 U.S. 697) 21
Granik v. *FCC*, 252 F.2d 822 (C.A.D.C., 1948) 10
Gray v. *Board of Trustees*, 342 U.S. 517 8
Halpern and Seltzer v. *FCC*, No. 500 ..... 6, 19, 20
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 14
Ickes v. *Associated Industries of New York State*, 320 U.S. 707 8
James F. Rivers, Inc. v. *FCC*, —— F.2d —— (August 24, 1965) 18
KFAB Broadcasting Co. v. *FCC*, 177 F.2d 40 (C.A.D.C., 1949) 12
Little v. *Bowers*, 134 U.S. 547 8
Mansfield Journal Co. v. *FCC*, 180 F.2d 28 (C.A.D.C., 1950) 9
Mid-Florida Television Corp. v. *FCC*, No. 294 6
NLRB v. *P. Lorillard*, 314 U.S. 512 12
North American Airlines, Inc. v. *CAB*, 237 F.2d 209 (C.A.D.C., 1956) 10
O'Donoghue v. *United States*, 289 U.S. 516 7
Pinellas Broadcasting Co. v. *FCC*, 230 F.2d 204 (C.A.D.C., 1956) 16
Poe v. *Ullman*, 367 U.S. 497 11
Pope v. *United States*, 323 U.S. 1 21
Ranger v. *FCC*, 294 F.2d 240 (C.A.D.C., 1961) 12
Rochester Tel. Corp. v. *United States*, 307 U.S. 125 7
Simmons v. *FCC*, 145 F.2d 578 (C.A.D.C., 1944) 9
Simmons v. *FCC*, 169 F.2d 670 (C.A.D.C., 1948), *cert. den.*, 335 U.S. 846 9

Page

South-Florida Television Corp. v. *FCC*, —— F.2d —— (C.A.D.C., July 8, 1965) 12, 18
Southwestern Publishing Co. v. *FCC*, 243 F.2d 829 (C.A.D.C., 1957) 10
St. Louis Amusement Co. v. *FCC*, 259 F.2d 202 (C.A.D.C., 1958) 12
Taylor v. *McElroy*, 360 U.S. 709 8
Unemployment Commission v. *Aragon*, 329 U.S. 143 16
United States v. *American Broadcasting-Paramount Pictures, Inc.*, No. 397 ..... 6, 18
United States v. *Fruehauf*, 365 U.S. 146 11
United States v. *Munsingwear*, 340 U.S. 36 8
Universal Camera Corp. v. *Labor Board*, 340 U.S. U.S. 474 11
WKAT, Inc. v. *FCC*, 296 F.2d 375 (C.A.D.C., 1961) 12
WMOZ, Inc. v. *FCC*, 344 F.2d 197 (C.A.D.C., 1965) 17
WORZ, Inc. v. *FCC*, 345 F.2d 85 (1965) 16
WORZ, Inc. v. *FCC*, 323 F.2d 613 (1963), cert. den. 376 U.S. 914 16

Statutes:

Administrative Procedure Act:

Section 10(e), 60 Stat. 243, 5 U.S.C. § 1009(e) 21

Communications Act of 1934:

Section 402, 48 Stat. 1093 *et seq.*, as amended, 47 U.S.C. § 402 ..... 6, 15, 19, 20, 21
Section 403, 48 Stat. 1094, 47 U.S.C. § 403 15
Section 405, 48 Stat. 1095, as amended, 47 U.S.C. § 405 15
Communications Act Amendments, 1952, 66 Stat. 711 *et seq.* 7, 20

Judicial Code:

Section 1254, 62 Stat. 928, 28 U.S.C. § 1254 2

Page

Rules and Regulations of the Federal Communications Commission, 47 CFR:

Section 1.591 12

Administrative decisions:

Hearst Radio Inc., 15 F.C.C. 1149 (1951) 5
Wabash Valley Broadcasting Corp., 35 F.C.C. 677 (1963) 5
WPHF Broadcasting Co., 15 Pike & Fischer Radio Reg. 542 (1957) 14

Legislative materials:

Senate Report No. 44, 82d Cong., 1st Sess. 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,
Petitioner,

and

FEDERAL COMMUNICATIONS COMMISSION.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled action on May 6, 1965.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is printed as Appendix A hereto. The opinions of the Federal Communications Commission and of the Hearing Examiners are reported at 35 F.C.C. 401 and are printed as Appendices B and C hereto.

---

[1] This caption is unusual because there is no party with an interest adverse to petitioner with respect to the issues raised. See pp. 7-11, *infra*. Out of an abundance of caution we have served all persons who were parties below.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals was entered on May 6, 1965. A timely petition for rehearing was denied on June 21, 1965.

Questions Presented

The court below set aside a decision of the Federal Communications Commission reaffirming its grant in 1956 of a construction permit to petitioner. The Commission in 1960 had reopened the record to determine whether the grant should be set aside by reason of any impropriety or misconduct by any of the participants in the original proceeding. The Court of Appeals affirmed the determination of the Commission that the unsuccessful applicant, appellant below, should be disqualified and that petitioner, the successful applicant, was not disqualified. The court, however, went on to nullify the original proceeding, setting aside the Commission's grant to petitioner and directing the Commission to accept new applications for a permit from any qualified person, including petitioner. The following questions are presented:

1. Whether, having decided that the Commission had properly disqualified the appellant below, there remained a case or controversy upon the basis of which the court had jurisdiction to set aside the Commission's grant of the license to petitioner and to order the Commission to institute a new proceeding and to accept new applications.

2. Whether, assuming a case or controversy was presented, the court exceeded the proper scope of review and invaded the province of the Commission in voiding the grant and directing the Commission to accept new applications.

Statutes Involved

The statutes relevant to this petition are set forth in Appendix D hereto.

Statement

In August 1956, after a comparative hearing on three mutually exclusive applications, the Federal Communications Commission granted petitioner a construction permit for Channel 12 in Jacksonville, Florida (J.A. 277). Neither of the losing applicants, Jacksonville Broadcasting Corporation and the City of Jacksonville (hereinafter referred to as "JBC" and "the City") appealed. In due course a license was issued to petitioner and duly renewed.

In 1958, testimony before a Congressional subcommittee suggested that improper *ex parte* contacts with the Commission might have been made by one or more of the applicants for Channel 12. After investigation, the Commission, on August 2, 1960, *sua sponte* ordered a hearing to determine whether the award to petitioner should be set aside and whether any of the applicants should be disqualified (J.A. 281-84).

Following an extensive further investigation by Commission counsel, hearings were held which produced more than 1200 pages of testimony and 118 exhibits. The Hearing Examiners on April 11, 1962 issued an initial decision (App. C, pp. 49-78, *infra*) holding (1) that both JBC and the City were disqualified because of attempts by persons identified with them to influence the Commission's decision by improper means; (2) that no person identified with petitioner made any *ex parte* representations to the Com-

[2] In addition to the findings noted in the text, the Examiners rejected contentions made during the proceeding, that there were two or three additional improper efforts to influence the Commission's decision, as not supported by the evidence. In addition, the Examiners noted that the petitioner, through its own representatives and through others whose

mission; (3) that there were two *ex parte* representations to the Commission in support of petitioner, neither one known to or attributable to petitioner; (4) that petitioner was not disqualified because nothing in the record reflected adversely upon it;[2] (5) that Commissioner Richard A. Mack should have disqualified himself from participating in the original decision because he had solicited advice about the merits of the competing applicants from a friend who was not identified with any applicant;[3] (6) that because of Commissioner Mack's disqualification the Commission's original decision was void *ab initio* and that the grant to petitioner should be set aside; and (7) that because petitioner had committed no impropriety its operating authority should be continued pending final decision by the Commission.

The Commission's unanimous decision, issued on September 16, 1963, upheld the Examiners in disqualifying JBC, in finding petitioner qualified and free from misconduct of any kind, and in finding that Commissioner Mack should have disqualified himself from participating in the proceeding.[4] Because Commissioner Mack had participated, the Commission set aside the original grant as void *ab initio;* but because petitioner was innocent of any misconduct, the Commission made a new grant to petitioner *nunc pro tunc.*

JBC appealed. It contended that the Commission had erred both in finding it disqualified and in finding petitioner qualified. The court below held, first, that the disqualification of JBC was amply supported by the evidence. Next,

---

assistance it enlisted, held discussions with appropriate government officials with respect to the Navy Department's objection to the height of petitioner's proposed tower. Neither the Examiners, the Commission nor the court has ever suggested that these efforts were in any respect improper.

[3] No advice was given suggesting favorable consideration for petitioner.

[4] The Commission reversed the Examiners' finding with respect to the City and held it not disqualified, but the City had stated that it did not seek the permit.

it rejected the Commission's contention that the court's affirmance of the disqualification of the appellant foreclosed further review of the Commission's decision. The court then affirmed the Commission's finding that petitioner was qualified.

Since JBC had not challenged the right of the Commission to make a new grant on the basis of the original record as supplemented, this disposed, in favor of the Commission and the petitioner, of all the issues raised and argued by the appellant. However, the court did not thereupon affirm the Commission's order. Rather, it set it aside because it disagreed with the Commission's action in making a new grant to petitioner. The court asserted, without any reference to the evidence upon which it relied, that the original grant "must be held to have been influenced by the *ex parte* representations made for [petitioner's] benefit," and held that in these circumstances the Commission should be required to accept new applications from any qualified applicant. This included petitioner, but the court ordered that petitioner must compete "on a completely equal and in no sense a preferred basis with any other applicant who might apply."[5]

In short, the court held that the *ex parte* representations, though not made by or attributable to petitioner, required the nullification of all the Commission's proceedings and licenses since 1953. The Court did not, however, explain why—or even, for that matter, state that—it was arbitrary and unreasonable for the Commission to have adopted the contrary view that, while Commissioner Mack's disqualification required the voiding of the original grant, it did not affect the hearing record, so that a grant by the present

---

[5] Under the Commission's practice, a licensee with a good record of performance is preferred over competing applicants. See e.g., *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963); *Hearst Radio Inc.*, 15 F.C.C. 1149 (1951).

Commission could properly be made on the basis of that record.

Reasons for Granting the Writ

This case presents, in aggravated form, an example of the recent marked shift in the boundaries dividing the respective responsibilities of the Federal Communications Commission and the reviewing court. The Court of Appeals for the District of Columbia Circuit has exclusive appellate jurisdiction to review decisions of the Federal Communications Commission granting or denying radio and television licenses. 47 U.S.C. 402(b). In a number of cases decided during this past term, four of which are now before this Court on petition for certiorari,[6] that court has undertaken a close superintendence of the Commission's exercise of its statutory responsibilities, and has based its decisions not upon the standards established by this Court in cases such as *FCC* v. *Schreiber,* 381 U.S. 279, decided only last term, but rather upon the court's own view of the requirements of the public interest.

So sharp a departure from the ordinary norms respecting judicial review suggests the possibility that the Court of Appeals considers its authority under the Communications Act to be different from the authority of courts reviewing decisions of other agencies. And, in fact, in one of the cases now pending before this Court, *Halpern and Seltzer* v. *F.C.C.* (No. 500), the Court of Appeals apparently rested its decision upon a novel and, we believe, erroneous interpretation of section 402(h) of the Act, 47 USC 402(h), one of the provisions dealing with judicial review. In the case at bar, moreover, the Court of Appeals not only overreached its statutory review authority but also exceeded

---

[6] In addition to this case, they are: No. 294, *Mid-Florida Television Corp.* v. *FCC;* No. 500, *Halpern & Seltzer* v. *FCC;* No. 397, *United States* v. *American Broadcasting-Paramount Pictures, Inc.*

its constitutional power under Article III, as that power has been defined by this Court. In such circumstances, action by this Court is necessary so that the proper balance between the Commission and the Court of Appeals may be reestablished.

1. *"Case or controversy."* We discuss first our contention that, once the Court of Appeals held that the Commission had properly disqualified JBC, the appellant below, it had no power under Article III of the Constitution to go on to set aside the Commission's grant to petitioner and to order the Commission to accept new applications for Channel 12.[7]

The constitutional requirement that forbids a court from acting except when an actual "case or controversy" is presented applies with full force to appellate courts when reviewing the decisions of administrative agencies. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 131. Ordinarily the formulation under these circumstances is in terms of "standing" rather than in terms of the existence of a justiciable controversy, but the same principles apply in both instances.[8]

---

[7] The Court of Appeals for the District of Columbia Circuit is, of course, an Article III court. *O'Donoghue* v. *United States,* 289 U.S. 516. While it may be that it can be given non-judicial power, *cf. Glidden Company* v. *Zdanok,* 370 U.S. 530, 580-581, unless the Congress confers such power the court can act only if a case or controversy is presented. And this Court has held that, in reviewing decisions of the Federal Communications Commission, the Court of Appeals exercises judicial, not administrative, authority. *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U.S. 266, 274-278. We discuss below, pp. 18-21, the possibility that a 1952 amendment to the Communications Act conferred administrative powers upon the Court of Appeals.

[8] "Limitation on 'the judicial Power of the United State' is expressed by the requirement that a litigant must have 'standing to sue' or, more comprehensively, that a federal court may entertain a controversy only if it is 'justiciable'. . . . The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy'." Frankfurter, J. concurring in *Anti-Fascist Committee* v.

Obviously, a denied applicant has standing to appeal initially when it asserts that its application has been improperly denied. But a controversy may cease to be justiciable during the course of litigation, see, *e.g.*, *Taylor* v. *McElroy*, 360 U.S. 709; *Gray* v. *Board of Trustees*, 342 U.S. 517; *United States* v. *Munsingwear*, 340 U.S. 36, 39; *Ickes* v. *Associated Industries of New York State*, 320 U.S. 707; *Little* v. *Bowers*, 134 U.S. 547; *California* v. *San Pablo Etc. R.R.*, 149 U.S. 308; and that is precisely what happened when the Court of Appeals determined that the Commission had properly disqualified JBC. That determination having been made, JBC had no standing to challenge any other aspects of the Commission's decision, and the Court in consequence had, as to the remainder of the case, no jurisdiction except to dismiss the appeal.

The governing principle is that, where the decision against a party on one or more of several issues presented is dispositive of that party's claim, the court may not decide any other issues because the party has lost its justiciable interest in securing a decision as to those issues. Thus, in *Electric Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, a patent infringement case, the Court held that, once the lower court had found that there was no infringement by defendants, it could not go on to decide that plaintiff's patent was valid. In explaining this decision in *Altvater* v. *Freeman*, 319 U.S. 359, 363, this Court stated:

> "The District Court adjudged a claim of a patent valid although it dismissed the bill for failure to prove infringement. We held that the finding of validity was immaterial to the disposition of the cause and that

---

McGrath, 341 U.S. 123, 150. See also the discussion in the dissenting opinion of Mr. Justice Douglas in *Communications Comm'n* v. *N.B.C.*, 319 U.S. 239, 264.

> the winning party might appeal to obtain a reformation of the decree. To hold a patent valid if it is not infringed is to decide a hypothetical case."[9]

The *Electric Fittings* rule would seem to be fully applicable here. After the reviewing court decided that JBC's cause was lost because it was properly disqualified, it seems clear enough that the decision of any further questions would be "to decide a hypothetical case."

That this is the correct approach has been recognized by the court below in a series of cases prior to the one at bar. *Simmons* v. *FCC*, 145 F. 2d 578 (C.A.D.C. 1944), *Simmons* v. *FCC*, 169 F. 2d 670 (C.A.D.C. 1948), *cert. den.*, 335 U.S. 846, and *Mansfield Journal Co.* v. *FCC*, 180 F. 2d 28, 36-37 (C.A.D.C. 1950), all involved appeals by parties whose applications for licenses had been denied by the Commission while mutually exclusive applications by others had been granted. In each case the court refused to inquire into the validity of the grants once it affirmed the Commission's denial of appellant's application upon independent rather than comparative grounds. As the court explained in the *Mansfield Journal* case:

> "Mansfield's application has been denied on totally independent grounds which this Court has herein sustained. The fact that Fostoria's application is mutually exclusive of Mansfield's is now immaterial. Mansfield's status has become that of a member of the general public."

Similar decisions involving review of Civil Aeronautics Board orders were rendered in *Continental Southern Lines*,

---

[9] The Court at this point cited *Cover* v. *Schwartz*, 133 F. 2d 541 (C.A. 2, 1942) in which Judge Frank made a detailed analysis of this doctrine. He concluded that "once the issue of infringement is decided against the patentee, there exists no case or controversy justifying a decision in his favor that the patent is valid." *Id.*, at p. 545.

Inc. v. *CAB*, 197 F. 2d 397 (C.A.D.C. 1952), *cert. den.*, 344 U.S. 831, and *North American Airlines, Inc.* v. *CAB*, 237 F. 2d 209 (C.A.D.C., 1956). See, also, *Southwestern Publishing Co.* v. *FCC*, 243 F. 2d 829, 832-33 (C.A.D.C., 1957); *Granik* v. *FCC*, 252 F. 2d 822 (C.A.D.C., 1948).

Indeed, the *Electric Fittings* and *Simmons* principle would appear to apply *a fortiori* here. At least the parties in those cases at the time of argument had adverse interests respecting the issues of patent validity and licensee qualifications. But in the case at bar JBC was never concerned with the determination of whether strangers to the litigation should be allowed to become applicants and had never challenged the right of the Commission to make a grant in the proceedings before it to one of the original applicants. Thus there was lacking that "lively conflict between antagonistic demands, actively pressed, which makes litigation of the controverted issue a practical necessity." *Poe* v. *Ullman*, 367 U.S. 497, 503. See also *United States* v. *Fruehauf*, 365 U.S. 146, 157.

Although the *Simmons* line of cases was called to the lower court's attention, it did not even advert to them or otherwise explain why they were not controlling,[10] except for the bare assertion that the "whole case is . . . in process of decision and our review of it may be completed on all issues."[11] But if this rationale were sound, there

---

[10] The dissenting judge below, who agreed with the majority that the court should decide the issue of petitioner's qualifications, did refer to these cases but said only that "[w]hen a regulatory agency so far departs from protecting the public interest, some means must be found to ventilate the processes employed." See p. 32, *infra*.

[11] The court did observe that the appeal rested "in good part upon [JBC's] claim that the Commission used a double standard on the issue of disqualification—one as to it and another as to Florida-Georgia." But the "double standard" claim could at most afford a basis for a determination by the court whether or not the Commission's disqualification of JBC was based on an unfair standard, and would not justify consideration of issues that were not even raised.

could never be a moot case once an appeal has been argued to the court. The case or controversy requirement means more than that there are issues presented. The issues must affect the litigants before the court. Once JBC's disqualification was affirmed, every vestige of interest in the proceedings on its part was gone. There remained before the court only the Commission and petitioner, both supporting the Commission's decree. There were thus present those circumstances which in the past have uniformly resulted in a dismissal of the proceedings.

The short of the matter is that the court below, because it differed with the Commission as to the requirements of the public interest, entered an order that advantaged no party before it. This is wholly appropriate for an administrative agency; it is beyond the power of an Article III court. The action of the Court of Appeals constituted a significant departure from an important constitutional limitation that calls for correction by this Court.

2. *Statutory scope of review.* Even assuming the existence of a case or controversy, the action of the court below setting aside the grant to petitioner and ordering the Commission to accept new applications was inconsistent with this Court's decisions delineating the statutory scope of judicial review of Commission decisions.

This Court has repeatedly emphasized that the Congress has entrusted to the Commission the responsibility to determine what the public interest requires with respect to the regulation of the communications industry, and that the jurisdiction of the courts is confined to correcting errors of law made by the Commission. See, *e.g.; FCC* v. *Schreiber,* 381 U.S. 279; *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138; *Communications Comm'n* v. *WJR,* 337 U.S. 265, 272; *Communications Comm'n* v. *WOKO,* 329 U.S. 223, 229; cf. *Universal Camera Corp.* v. *Labor Board,* 340 U.S.

474, 488; *NLRB* v. *P. Lorillard*, 314 U.S. 512. As the Court has held as recently as last term in *Schreiber*, the resolution of competing policy considerations is for the Commission, and the courts may reverse the Commission only if the agency's action was "arbitrary or capricious." 381 U.S., at 293.

The action of the court below in overturning the Commission's decision to award the license to petitioner on the basis of the original record of proceedings cannot be reconciled with these decisions of this Court. The procedure adopted by the Commission is supported by the following perfectly reasonable considerations: the existence of an untainted hearing record, the desirability of adherence to the Commission's standard procedures respecting the "cut-off" of applications so as to insure administrative finality,[12] and the unfairness of imposing a serious penalty upon a wholly innocent licensee. In consequence, the court below could not properly have termed the agency action "arbitrary or unreasonable," or without "warrant in the record or a reasonable basis in law." *Board* v. *Hearst Publications*, 322 U.S. 111, 131. But the court did not even purport to follow these well established standards. Rather, it reversed the Commission simply on the basis of its own conception of

---

[12] The Commission's application of its "cut-off" rules, 47 C.F.R. 1.591, an aspect of its procedures made necessary by the doctrine of *Ashbacker* v. *FCC*, 326 U.S. 327, see *Ranger* v. *FCC*, 294 F. 2d 240 (C.A.D.C. 1961), has uniformly been upheld in the courts. *Ranger* v. *FCC, supra; Century Broadcasting Corp.* v. *FCC*, 310 F. 2d 864 (C.A.D.C. 1962); *KFAB Broadcasting Co.* v. *FCC*, 177 F. 2d 40 (C.A.D.C. 1949); *St. Louis Amusement Co.* v. *FCC*, 259 F. 2d 202 (C.A.D.C. 1958). These rules have consistently been applied so as to result in the grant of a permit where there is only a single qualified applicant because for one reason or another other competing applicants have withdrawn or been disqualified. Even in the other cases involving *ex parte* representations, where a previously unsuccessful applicant—as contrasted with the successful applicant here—was held to be the sole remaining qualified applicant, a permit was granted and a short term license issued. These decisions were upheld by the court below. *WKAT, Inc.* v. *F.C.C.*, 296 F. 2d 375 (C.A.D.C. 1961); *South Florida Television Corp.* v. *F.C.C.* — F. 2d — (C.A.D.C. July 8, 1965).

how the public and private interests involved could best be served—an impermissible ground under decisions such as *Schreiber*, 381 U.S., at 291.

The error of the court below is accentuated by the fact that the ground upon which it apparently acted would not have been an adequate basis to open Channel 12 to new applicants even if it had been relied upon by the Commission. The court stated that the public interest required that new applications be accepted because the original grant to petitioner "must be held to have been influenced by the *ex parte* representations made for [petitioner's] benefit." But this assertion, even if supported by the record, would have been a basis only for voiding the original grant. That, of course, is just what the Commission did. The court did not suggest that the record of Commission proceedings was affected in any way, and thus stated no ground adequate to support the conclusion that the Commission could not or should not have made a new grant on the basis of that record.[13]

Moreover, this conclusion of fact by the court is not supported by any subsidiary findings by the court, for it made none, or by any facts found by the Commission. The Commission set the original grant aside, not because it found that any *ex parte* representations had influenced that grant, but solely because a disqualified Commissioner had participated in the proceeding. It is evident from the Commission's and the Examiners' opinion (pp. 23-26 *infra*) that they did not believe the grant itself had in any way been influenced by these *ex parte* contacts. The court's conclusion to the contrary has no support in the record, and significantly the court made no reference to the facts or

[13] It may be noted that the Court did not even intimate that it disagreed with the Commission's obvious view that the record of petitioner's qualifications was not stale. Plainly, such a determination is within the discretion of the Commission. Moreover, the remedy for a stale record is to bring it up to date, not to cancel the entire proceeding and begin all over.

circumstances upon which it relied.[14] The critical consideration, however, is that the court intruded upon the Commission's jurisdiction even to the point of making new findings of fact.

The court's failure to adhere to the *Schreiber* doctrine had still another aspect—the *sub silentio* decision by the court of an important question relating to the Commission's jurisdiction, a question which the Commission had expressly refused to decide. Petitioner had contended, both to the Commission and to the court, that while the Commission had ample authority under Section 312, 47 U.S.C. 312, to hold a revocation of license proceeding, it had no power to reopen the original proceedings, since under the Communications Act of 1934 the grant of a construction permit and issuance of a license after no

---

[14] The Commission found, based upon what it described as a vigorous and conscientious investigation of petitioner, its principals and associates, that there were two efforts to influence the Commission in petitioner's favor. Neither effort had been instigated by or known to any of petitioner's shareholders, officers, agents or employees, and both were insignificant. The first was a letter to Commissioner Mack constituting "an expression of an opinion by an interested citizen who was acquainted with and held the principals of Florida-Georgia in personal regard," to which Commissioner Mack replied that the "matter is to be set for oral argument and . . . will be carefully considered." (J.A. 293, Tr. 6673). The second was an effort by a political opponent of JBC to indicate to Commissioner Lee a preference for petitioner, but he was summarily rebuffed before he could make his views fully known. There was also evidence before the Commission that Commissioner Mack had told a third party that he had promised one of petitioner's principals help in obtaining the television facility in Jacksonville. But the court obviously could not have had this evidence in mind, for its only relevance would have been to petitioner's qualifications and the court's affirmance of the Commission's finding that petitioner was qualified showed that it approved the Commission's refusal to credit this hearsay evidence. The reasons that led the Commission not to credit this evidence and the probable explanation of the Commission's failure to elicit testimony from Mr. Mack require exposition at a length more appropriate to a brief on the merits than to a petition for certiorari. They are set out in the record in the Answer of Intervenor in Support of Rehearing in the court below at pp. 15-20. The other evidence that might conceivably be relevant to the court's conclusion is too trivial or remote to warrant mention.

appeal is taken is a final determination that may not be reopened by the Commission. See *WPHF Broadcasting Co.*, 15 Pike & Fischer RR 542, 543-44 (1957).

The Commission recognized that the contention was substantial [15] but held that it need not reach this question, stating that its action in reopening the proceeding and voiding the initial grant had no adverse effect upon petitioner because it was simultaneously making a new grant (App. B, p. 41, *infra*). The court below evidently did not consider this issue to be before it. Thus this issue has been decided against petitioner although it has been considered neither by the court nor by the Commission.

The very most the court might have been at liberty to do in these circumstances would have been to remand to the Commission if it thought additional findings were desirable, or if it wanted an initial determination as to the Commission's power to act in other than in revocation proceedings, or if it wanted the Commission to set forth with particularity the reasons supporting its decision to award the permit upon the basis of the original record. Where it appears to a reviewing court that the appropriate determination of a case may depend upon the resolution of an issue not passed upon by the agency, the proper course is to remand

---

[15] In our view, the suggestion of the Hearing Examiners that *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, could be relied upon to support the Commission's power to reopen the proceedings is unsound. That case held only that a judge-created rule that judgments could not be disturbed after the expiration of their term of entry should not be given effect to prevent equitable relief against fraudulent judgments. A decision to the contrary would have enabled the offending party to retain the fruits of his fraudulent judgment. But here, in the first place, the finality of the grant was established by Congress in Section 403 of the Act. 47 USC 403. See, also, Sections 402 and 405, 47 USC 402, 405, and *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322, 334. Second, the Commission would not be powerless to protect the public interest since the Congress provided, in Section 312 of the Act, for the revocation of licenses, and a finding that a license had been procured by fraud or other serious misconduct is plainly ground for revocation.

the case to the agency. As the Court put it in *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155:

> "The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling and state the reasons for its action."

See, also, *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20; *Pinellas Broadcasting Co.* v. *FCC*, 230 F. 2d 204, 211-214 (C.A.D.C. 1956); *Fleming* v. *FCC*, 225 F. 2d 523, 526 (C.A.D.C. 1955).

3. *Related decisions of the Court of Appeals.* As we suggested earlier, the decision of the court below in this case does not stand alone. Rather, a series of recent decisions by that court appears to reflect the view that its jurisdiction to review Federal Communications Commission decisions is broader than the ordinary scope of judicial review of administrative agency action. In those decisions, as in the one at bar, the court's holdings were based not on determinations that the Commission had been arbitrary or capricious but rather upon the court's own announced view of the public interest.

WORZ, Inc. v. *FCC*, 345 F. 2d 85 (1965), here on petition for certiorari in No. 204 is one example. In an earlier decision in the same case, *WORZ, Inc.* v. *FCC*, 323 F. 2d 618 (1963), *cert. denied* 376 U.S. 914, the Court of Appeals, although accepting the Commission's findings of fact concerning asserted *ex parte* representations, remanded the case to the Commission for an initial determination whether to grant the application of one of two qualified applicants or, in the light of the age of the record, to reopen the proceedings. This action by the court was

in full accord with the decisions of this Court respecting the limited scope of judicial review. However, when the Commission granted one of the applications the Court of Appeals reversed and ordered the Commission to open the proceedings to new applicants. The court did not purport to find the Commission's decision unreasonable or plainly erroneous. It said only that in its view the public interest was not "adequately effectuated" by the Commission's decision. 345 F. 2d at 86.

In several other recent decisions as well, the court below has acted as if it had both administrative and judicial powers. In *WMOZ, Inc.* v. *FCC,* 344 F. 2d 197 (C.A.D.C. 1965), the Court of Appeals reversed a Commission decision denying a motion to reopen a record to receive newly discovered evidence. The court did not say that the Commission's decision was unreasonable or arbitrary. It said only that it would have been better and in the public interest for the motion to have been granted. It then directed the Commission not only to accept the proffered evidence, which was in the form of affidavits, but to take oral testimony. Surely this was an interference in the Commission's procedures not contemplated by *Schreiber, WJR* and *Pottsville, supra.*

In *Citizens Television Protest Committee* v. *FCC,* — F. 2d —, (May 7, 1965), the court reversed a Commission holding that a petition for reconsideration, filed by a person not a party to the prior Commission proceedings, failed to satisfy the requirement of the Commission's rules that good reason be shown for a failure to participate at an earlier stage. Judge Fahy dissented on the ground that the Commission's decision was not unreasonable. The majority opinion, however, did not even consider this question. Instead it embarked upon a wide ranging examination of the merits far more appropriate for an administrative agency than a reviewing court. It ordered a new hearing and prescribed

in detail the issues that were to be tried. The reversal was based in principal part upon a conclusion that the Commission had failed to provide adequate protection to a party that disclaimed any need therefor and that in fact was actively supporting the Commission's decision.

In *South Florida Television Corp.* v. *FCC*, — F. 2d — (July 8, 1965), an appeal involving competing applicants for a construction permit, the court directed the parties to file briefs discussing the bearing upon the public interest of the number, length and audio volume of commercials in relationship to the other parts of the program. After all the parties joined in contending that the court had no authority to raise this new issue,[16] the court decided the case although apparently without relinquishing its view that it had the authority to require that these matters be taken into consideration. See footnote 3 at p. 4 of the slip opinion of the court.

In his conditional petition for certiorari in No. 397, *United States* v. *American Broadcasting-Paramount Pictures, Inc.*, pp. 15, 11, the Solicitor General summarizes the problem as a "policy dispute between the Commission and the court below" and asserts that the position of the court may be in conflict with the decisions of this Court that hold that the Congress has assigned policy determinations to the Commission and not to the courts.

These cases are illustrative of a significant change in the division of responsibility between the Communications Commission and the Court of Appeals for protecting the public interest in the field of radio and television broadcasting.[17] The position of the Court of Appeals can be sus-

[16] See the dissenting opinion of Judge Wright at p. 6 of the slip opinion.

[17] In *James F. Rivers, Inc.* v. *FCC*,—F. 2d — (August 24, 1965), the Chief Judge, concurring, said explicitly that the court does not consider itself bound by a narrow scope of review when considering a Commission determination that a radio station did or did not discriminate against a

tained only upon a speculation that it has found a new statutory authority to exercise a policy supervision over the Commission. That speculation derives chiefly from *Halpern and Seltzer* v. *FCC* (March 17, 1965), now before this Court on petition for certiorari in No. 500. There, as in the case at bar, the Court of Appeals ordered the Commission to accept new applications for a permit even though the court did not hold that the party to whom the Commission proposed to make the grant was unqualified. The court, in granting that relief, took the extraordinary action of rejecting a considered decision of an administrative agency without writing an opinion. The respondent in that case, a prospective applicant for the permit, had urged the court to act under what it asserted to be the "original jurisdiction" conferred by Section 402(h) of the Communications Act. 47 U.S.C. 402(h). Section 402(h) provides that, upon remand to the Commission following a reversal by the Court of Appeals, "it shall be the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined." 47 U.S.C. 402(h).

This provision was added to the Act in 1952 in response to *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146. There this Court had upheld as within the Commission's discretion its action in opening a proceeding to new applicants after a party to the initial proceeding had secured a reversal of the Commission in the Court of Appeals. The Congress thought this unfair to the appealing party, and so specified that in such circumstances the proceedings after

---

segment of the community by failing to broadcast programs which satisfied the needs of that segment. Three cases in this Court were cited, none of which support his position.

remand should be confined to the original parties and the original record "unless otherwise ordered" by the court.

This excepting phrase might conceivably be thought to give the Court of Appeals jurisdiction to direct the Commission's proceedings upon remand in accord with the court's conception of the public interest rather than the Commission's. So read, it would reverse not merely the result of *Pottsville,* but also its broad principle that the Commission has the primary responsibility to determine the course and outcome of its proceedings.[18]

But while there is some legislative history that might support such an interpretation of the provision,[19] so far as we are aware until *Halpern and Seltzer* no court had ever suggested that Congress intended the "unless otherwise ordered" phrase to alter so radically the relationship between court and agency. Rather, in our view, the function of Section 402(h) is simply to limit the Commission's freedom following remand while permitting the court to authorize relief appropriate in the sort of case in which the Commission has erred, for example, in refusing to consider an application in the initial proceeding, or where it has erroneously excluded evidence. The effect of the 1952 amendment, therefore, was to increase the number of cases that would be decided on the basis of the original record.

---

[18] It might also raise questions of constitutional magnitude. See *Glidden Company* v. *Zdanok,* 370 U.S. 530, 580-581.

[19] "Subsection (h) contains provisions which are intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the court in the absence of proceedings to review. The committee points out that under the language of this subsection the appellate court would have ample authority, either on its own motion or upon the petition of the Commission or any other litigant, to provide, either as a part of its original decree or supplementary thereto, that new parties and new issues may be introduced and a new record made after remand to the Commission. This authority stems from the phrase 'and unless otherwise ordered by the court.'" Sen. Rep. No. 44, 82nd Cong., 1st Sess., p. 12.

That this is the correct reading of this section is demonstrated by the fact that section 402(g), enacted at the same time as section 402(h), provides that appeals shall be determined "in the manner prescribed by section 1009(e) of Title 5." 47 U.S.C. 402(g). That section, 10(e) of the Administrative Procedure Act, provides for a limited judicial review only and one that is applicable to agency action generally. Moreover, if section 402(h) is read to grant the Court of Appeals authority to make administrative decisions, this might deprive this Court of the power to review those decisions.[20] Such an intention should not lightly be ascribed to the Congress, particularly since section 402(j) expressly provides for such review.

If, however, the court below has at this late date correctly discovered in section 402(h) a new source of authority over the decisions of the Commission, it is of evident importance that this be made known to the agency and to the persons subject to its regulatory jurisdiction. Since the court's power to act is dependent in any event upon an appeal being taken from the Commission's decisions, litigants must be advised as to what cases may appropriately be brought to the court and what relief may properly be obtained. And if the Congress has created the anomalous situation under which a different scope of review is applicable to FCC decisions than is applicable to the decisions of other independent agencies and the decisions of the court may properly be based upon its view of the requirements of the public interest, then the nature and limitations, if any, of this broadened review urgently require definition by this Court.

If, on the other hand, the review by the Court of Appeals under Section 402(h) is not to be distinguished from the

---

[20] *Federal Radio Commission* v. *Genereal Electric Co.*, 281 U.S. 464, 469; *Pope* v. *United States*, 323 U.S. 1, 13; *Gordon* v. *United States*, 2 Wall. 561; see 117 U.S. 697.

usual review applicable to other agency decisions—which we believe to be the case—then the repeated departure by the court below from the standards laid down by this Court calls for a restatement of those standards in this and the cases presenting related questions that are now before the Court.

Respectfully submitted,

WARNER W. GARDNER
LAWRENCE J. LATTO
WILLIAM H. DEMPSEY, JR.
734 Fifteenth Street, N.W.
Washington, D.C. 20005

BERNARD KOTEEN
ALAN Y. NAFTALIN
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

RICHARD F. WOLFSON
316 N. Miami Ave.
Miami, Florida
Attorneys for Petitioner.

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

KOTEEN & BURT
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,181

JACKSONVILLE BROADCASTING CORPORATION, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

FLORIDA-GEORGIA TELEVISION CORPORATION, INC., *Intervenor*

Appeal from a Decision of the Federal Communications Commission

Decided May 6, 1965

Before FAHY, *Circuit Judge,* BASTIAN, *Senior Circuit Judge,* and BURGER, *Circuit Judge.*

FAHY, *Circuit Judge,* and BASTIAN, *Senior Circuit Judge:* This is an appeal by Jacksonville Broadcasting Corporation (JBC) from a decision of the Federal Communications Commission reaffirming prior grants of a construction permit and television station licenses to Florida-Georgia Television Company, Inc., the intervenor, to operate on Channel 12 in Jacksonville, Florida, and finding JBC to be disqualified from consideration.

The case was commenced in 1952 by appellant in filing an application for a construction permit for a new television broadcast station on the channel. Competing applications were filed by the City of Jacksonville and by Florida-Georgia. The Commission designated the three applications as mutually exclusive and provided for a consolidated proceeding. The hearing examiner on April 4, 1955, released an Initial Decision proposing to award the construction permit to JBC. Exceptions were filed by the

two other applicants and the case was heard by the Commission on February 6, 1956. In August of that year the Commission released its final decision, granting the application of Florida-Georgia and denying the applications of JBC and the City of Jacksonville. JBC filed a petition for rehearing and reconsideration, which was denied by the Commission on August 1, 1957. No appeal was taken from the Commission's final decision. On September 20, 1957, the Commission granted a license to Florida-Georgia and a modified license on May 22, 1959.

On August 2, 1960, the Commission by order reopened the record to determine whether the award to Florida-Georgia should be set aside as void or voidable and whether any of the parties to the proceeding should be disqualified by reason of misconduct. This action of the Commission was the result of testimony taken before the Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives, from which it appeared that *ex parte* presentations had been made by one or more of the applicants in connection with the award of the permit in question. The Commission designated the following issues for further hearing:[1]

1. To determine whether any of the members of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 12 in Jacksonville.
2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings resulting in the award of the construction permit for Channel 12, Jacksonville, in any manner whatsoever except by the recognized and public processes of adjudication.

---

[1] The Commission appointed the Chief Hearing Examiner as presiding officer of the hearings. Later, the parties agreed that he would be assisted in the preparation of his report by Hearing Examiner Chester F. Naumowicz, Jr.

3. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for Channel 12 in Jacksonville directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings.
4. To determine, in the light of the facts adduced upon the foregoing issues, whether the grant heretofore made of a construction permit for Channel 12, Jacksonville, was void *ab initio* and if not, whether such grant is voidable and action should be taken to set it aside; whether any of the applicants in this proceeding was and is disqualified to receive a grant of its application; and whether the conduct of any applicant, if not of a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

All applicants in the original proceeding were permitted to participate as parties in the reopened proceeding, and opportunity was provided to any persons against whom evidence might be received to cross-examine and to submit rebuttal testimony. The Attorney General of the United States was permitted to participate as *amicus curiae*.

On April 11, 1962, the hearing examiners released their Initial Decision, holding that former Commissioner Richard A. Mack should have disqualified himself from participating in the original decision because of his *ex parte* discussions of the merits of the competing applicants while the original proceeding was pending before the Commission; further, that the City of Jacksonville and JBC should be disqualified from further consideration because of attempts made by persons identified with those parties to influence the Commission; and that Florida-Georgia was not shown by the evidence to be disqualified. By reason of Commissioner Mack's conduct, the original decision of August 31, 1956, was held to be void *ab initio* and the grant then made to Florida-Georgia was set aside.

However, in view of the fact that they found no impropriety to have been committed by Florida-Georgia, the examiners held that the public interest, convenience and necessity would be served by authorizing the continued operation of the television station by Florida-Georgia pending final disposition by the Commission.[2]

Appeal was taken to the full Commission, which, on September 16, 1963, with the unanimous vote of the four Commissioners voting, note 2, *supra,* released its final order. The Commission adopted most of the hearing examiners' conclusions, disagreeing, however, with the disqualification of the City of Jacksonville. But the City has voluntarily withdrawn and its application need not be considered.

The Commission agreed with the examiners that Commissioner Mack should have disqualified himself from the deliberations and decision in the original case and that the original grant to Florida-Georgia was invalid and should be set aside. It also concluded,

> that in any further proceedings to be had in connection with the subject applications, JBC is disqualified from consideration because of attempts by individuals identified with it to influence the Commission through methods outside the recognized and public processes of adjudication. City and Fla-Ga, on the other hand, are not shown by the evidence to be disqualified from further consideration and nothing in this record may be held to reflect adversely on their applications.

Finally, upon a complete review of the entire record, the Commission ordered,

> That the Commission's Decision of August 31, 1956, insofar as it granted a construction permit to Florida-Georgia Television Company, Inc., is *nunc pro tunc*

[2] On the original action of the Commission in 1956, Commissioners Hyde, Doerfer, Lee and Mack voted to adopt the decision; Commissioners McConnaughey and Bartley dissented; Commissioner Craven abstained. On the 1963 order, Commissioners Henry, Hyde, Bartley and Ford voted to adopt the decision; Commissioners Cox and Loevinger did not participate; Commissioner Lee was absent.

> READOPTED; The Commission's grants of station licenses on September 20, 1957 and February 12, 1958 are, *nunc pro tunc*, AFFIRMED; and the application of Florida-Georgia Television Company, Inc., for renewal of television station license for WFGA-TV, Jacksonville, Florida filed November 30, 1960, insofar as it has been continued in a deferred status by reason of the questions raised in this proceeding, Is REMOVED from such deferred status, without prejudice to any other causes for deferral imposed by Commission processes.

I. The order of the Commission disqualifying JBC is affirmed. The evidence of record amply supports the findings of the Commission that this applicant through its President, who was a controlling stockholder and director, in the language of the examiners, adopted by the Commission, sought outside influence,

> to induce the Commission to exercise its ultimate decisional authority to adhere to the original instructions given its staff to prepare a decision upholding the grant contemplated by the Initial Decision of the Hearing Examiner, irrespective of the significance which might be drawn by the Commission from its analysis of the evidence and the exceptions of the competing applicants and oral argument thereon.

We need not go into the details of the substantial evidence to that effect, justifying the finding and conclusion of disqualification. *WKAT, Inc.* v. *Federal Communications Comm'n,* 111 U.S. App. D.C. 253, 261, 296 F.2d 375, 383, *cert. denied,* 368 U.S. 841. The action of the Commission was altogether within its responsibility to administer the statute in the public interest.

II. The Commission contends that its disqualification deprives JBC of standing to contest the grant to Florida-Georgia, though the Commission does not move for dismissal of the appeal. In any event, we think JBC's disqualification does not preclude our review of the grant to Florida-Georgia. JBC had standing to bring the case

here. In considering its appeal from denial of the grant to it, and from the grant to Florida-Georgia, a competitor for the channel, JBC based its case in good part upon its claim that the Commission used a double standard on the issue of disqualification—one as to it and another as to Florida-Georgia. On JBC's appeal we are brought face to face with this and other problems as they bear upon the grant to Florida-Georgia. We are not required to abandon full consideration of these problems at the point where we uphold the Commission in finding JBC disqualified for grant of the channel to it. The whole case is then in process of decision and our review of it may be completed on all issues.

III. Intervenor Florida-Georgia, but not the Commission, would have us dismiss the appeal on a different ground. It points out that in October 1960 JBC undertook to assign to a partnership composed of its stockholders all interest in its application, shortly after which, on December 27, 1960, the corporate JBC was dissolved.[3] During the proceedings before the hearing examiners JBC made known its change in business form by filing a petition to amend its application. The hearing examiners stated that "the Commission itself does intend that the Jacksonville Broadcasting Corporation successors shall participate as respondents here" and that they would "defer action indefinitely on the petition to amend and permit this group now representing Jacksonville Broadcasting Corporation or its successors to participate as respondents in the proceedings." Counsel for Florida-Georgia stated he had no objection to the participation of the JBC group at that time. No further action was taken to change the nature of the appearance of record and the JBC group participated in the hearing, all pleadings being in the name of JBC. When the Initial Decision was rendered, the examiners denied the petition to

[3] The original proceedings had eventuated in 1956 with the award of the permit to construct the station on Channel 12 to Florida-Georgia. JBC participated in those proceedings but did not appeal from that decision. This did not preclude it from participating in the later proceedings if it was properly in them, as we hold to be the case.

amend the application, apparently believing it to be a futility in view of the disqualification of JBC.

After the examiners' decision JBC filed a notice of appearance indicating an intention to participate in oral argument before the full Commission. Florida-Georgia objected on the ground that the corporation had ceased to exist. The Commission declined to rule on the merits of this contention but denied Florida-Georgia's objection, stating:

> Suffice it to say that an entity styling itself "Jacksonville Broadcasting Corporation" has participated in this hearing thus far as a party respondent with the consent of all parties and has duly filed exceptions to the Initial Decision. Such entity, in the interests of a full record, will be permitted to argue such exceptions.

The "entity" continued to participate in the proceedings. When the Commission issued its final decision and order it declined to pass upon the corporation's continued status and related matters, stating that in view of its decision concerning the *ex parte* conduct of JBC it was unnecessary to do so, and since such conduct antedated the application the Commission concluded these questions had become moot. In this posture of the case the Commission affirmed the examiners' denial of JBC's petition to amend its application.

The appeal to this court is by the "entity" which had sought and been denied the right to the amendment but was allowed to press its case in all respects without regard to its internal status. Rather than dismiss its appeal for failure of the Commission to straighten out the matter in better fashion we give JBC the same "entity" status the Commission gave it. In the circumstances presented the relation of this court to the administrative process must be construed as sufficiently accommodating to authorize the court on the appeal of JBC to consider on the merits the decision of the Commission restoring

the grant of the construction permit and licenses to Florida-Georgia, contested by the "entity."[4]

IV. Finding that the *ex parte* representation in favor of Florida-Georgia could not be traced to its principals, or attributed to them, the Commission *nunc pro tunc* readopted the decision in favor of Florida-Georgia, made August 31, 1956, which it had reopened by its order of August 2, 1960. The Commission did not use a different standard with respect to Florida-Georgia from that it used in finding JBC disqualified. The factual situation affecting the two applicants, carefully analyzed by the Commission, was itself different in the important respect that the principals of JBC were responsible for the extrajudicial attempts to influence the Commission, while Florida-Georgia was found not to be responsible for the overtures in its favor. We are not persuaded that this factual decision of the Commission exonerating Florida-Georgia from wrongdoing in the respects here in issue should not be accepted by this court. The Commissioners who participated in this conclusion, note 2, *supra,* upon a careful review of the evidence, were unanimous. We accept their findings under the rule applicable to the scope of our review.

V. We do not agree, however, that the grants to Florida-Georgia should have been restored to their original status. Though Florida-Georgia was not disqualified the decision of August 31, 1956, awarding the construction permit to it, followed in due course by licenses, must be held to have been influenced by the *ex parte* representations made for its benefit, even though the principals of Florida-Georgia were innocent of such representations. Such innocence saves Florida-Georgia's qualification but does not validate grants which are the product, in part at least, of the wrongful influences brought to bear upon the result reached by the Commission in its favor. The original grant of August

---

[4] We have considered the contentions that Florida law prohibits the continuation of a corporate body such as JBC after its dissolution for the purposes of obtaining a television license. But without reaching a conclusion on this point we hold for the reasons we give that the motion to dismiss should not be granted.

31, 1956 was invalid by reason of these influences. Apparently the Commission's reason for readopting its original decision was that it thought Florida-Georgia was the only qualified applicant remaining in the case. This fails to take into account the invalidity of the original decision. The public interest cannot be reconciled with leaving in effect grants which on this record we must hold were in significant part the result of extra-judicial representations and influences. In applying the public interest standard the decision that an applicant is not disqualified because innocent of such extra-judicial activities solves only part of the problem. The activities exerted for the benefit of the applicant undermine the validity of the consequent grant to it.

The result is that the present restoration to Florida-Georgia of the construction permit authorized August 31, 1956, and ensuing licenses, must be set aside. Since the decision upon which they rest was originally invalid, the decision and its progeny remained invalid and could not be readopted as valid.

This leaves the channel free to be applied for by any qualified applicant. Jacksonville Broadcasting Corporation, its former officers and directors, the partnership and its members, are excluded because disqualified; but Florida-Georgia is not; for though the existing grant to it must be set aside it has not been disqualified and may compete, but on a completely equal and in no sense a preferred basis, with any other applicant who might apply. *Cf. WORZ* v. *Federal Communications Comm'n*, —— U.S. App. D.C. ——, —— F. 2d ——.

The motion to dismiss the appeal is denied. The order of the Commission is affirmed insofar as it relates to the disqualification of JBC. Insofar as it relates to the qualification of Florida-Georgia the order is also affirmed. The order is set aside insofar as it readopted the Decision of August 31, 1956, and insofar as it affirms the grant of station licenses made September 20, 1957, and February 13, 1958, and renewal of station license for WTBA-TV, November 30, 1960. The case is remanded to the Commission for further proceedings not inconsistent with this opinion.

As authorized in *WORZ, supra*, authority for continued

operation may be granted by the Commission in its discretion pending such further proceedings.

It is so ordered.

BURGER, *Circuit Judge, concurring in part and dissenting in part:* I concur in the majority's treatment of the standing[1] and jurisdiction[2] issues and in their affirmance of Jacksonville Broadcasting's disqualification. And I agree with the broad proposition relied on by my colleagues

---

[1] The Commission relies upon our decisions in Simmons v. FCC, 79 U.S.App.D.C. 264, 145 F.2d 578 (1944), and Mansfield Journal Co. v. FCC, 84 U.S.App.D.C. 341, 173 F.2d 646 (1949), for the proposition that Appellant has no standing to raise the propriety of the Commission's failure to disqualify its competitor, Florida-Georgia, if the record contains substantial evidence to support its own disqualification. The latter case is not in point, however, since it held merely that one applicant was not aggrieved by the award of *non*-mutually exclusive authority to another. And *Simmons* is readily distinguishable: There we found that an applicant whose antenna placement would be a hazard to air navigation had no standing to challenge a mutually exclusive award to another, since its own application could not be granted in any event. The clearly correct decision in that case does not automatically govern the present facts. For the instant situation goes to the integrity of the Commission's processes in a fundamental manner. As we said in WKAT, Inc. v. FCC, 111 U.S.App.D.C. 253, 261, 296 F.2d 375, 383, *cert. denied*, 368 U.S. 841 (1961):

> Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

The public interest clearly requires Appellant to be permitted this appeal —if for no other reason than the possibility that this court might have concluded to tell the Commission that it must begin all over again from the beginning. When a regulatory agency so far departs from protecting the public interest, some means must be found to ventilate the processes employed.

[2] I do not think that Southwestern Publishing Co. v. FCC, 100 U.S.App. D.C. 251, 243 F.2d 829 (1957), requires a contrary result. We there dismissed an appeal by an injured sub which had not been a party to the litigation conducted by its parent corporation at the Commission. That case involved a real difference in parties not present here.

that our scope of review of Commission action is limited. In observing those limits we are often compelled to affirm agency action on records which could well have led us to a different, even a completely opposite, conclusion. But this case, to me, falls within that narrow area where we ought to reverse Commission action because the very basis of the Commission's choice to disqualify one, while refusing to disqualify the other, of two applicants is untenable because a distinction between the two is without substantial record support. The Commission disqualified the Jacksonville group because of attempted but *unsuccessful* efforts to reach the Commission by ex parte contacts although the bulk of the evidence on this score relied upon by the Commission shows that the objective of these contacts was to urge the Commission to *disregard* political considerations and decide the case on its merits and on the record evidence. I do not challenge the Commission's power to draw their own inferences, even though I might read that evidence as of a less "sinister cast" than they do. What I see as grave error is the use of a double standard in evaluating misconduct.

Using two standards, as I see it, the Commission found no fault in the successful applicant, who is reasonably shown on this record to have been guilty of conduct at least as objectionable as that which disqualified Appellant. I would not try, however, to balance an appraisal of comparative misconduct, but would disqualify *both* applicants; I make comparisons only to illustrate what seems to me the irrationality of the Commission's conclusions and to demonstrate that it employed a double standard of ethics. It is important that this be spelled out.

The Commission's wrath was directed at Jacksonville Broadcasting Corporation in part because to Jacksonville's subsequent knowledge Congressman Herlong called the late Commissioner Mack, his fellow Floridian, to inquire about rumors that political influence was about to lead the Commission to reverse the award to Appellant under the Examiner's preliminary report at that time tentatively approved by the Commission. Congressman Herlong was so disturbed by Mack's ensuing confession of misconduct that he at once

reported the incident to the Chairman of the Committee on Legislative Oversight of the House Interstate and Foreign Commerce Committee. Later, in testifying before the Commission, the Congressman said Commissioner Mack had told him he, Mack, had committed himself to vote for the "Mitch Wolfson" group, Intervenor here, that he had made this commitment before coming to Washington to sit on the case, and that he had to stand by his commitment.

To read sinister implications into Congressman Herlong's actions, which the Congressman promptly made a matter of public record to his colleagues, is at least surprising. I suppose it not unlikely that it was Herlong's disclosures to Congress which led the Commission to recall and reopen the case on its own motion. Mitchell Wolfson, a dominant figure of the Intervenor, who controls three other Commission licensed communications channels,[3] testified that he had not sought or received any ex parte prehearing commitment from Mack. Although the supplemental Commission hearings were held at a time when Commissioner Mack was available, he was not called. The Commission was therefore faced with solid and credible evidence from a member of Congress that he had been told by Mack of an obviously illegal advance commitment to support the Intervenor regardless of the evidence. The only evidence tending to meet this grave accusation was Wolfson's testimony that *he,* Wolfson, had no knowledge of the matter. We are left by the Commission to assume that Mack made this commitment to the Wolfson group without any request—or inducement—from Wolfson or one of his associates. That Wolfson and Mack had contacts with each other is suggested by the "Dear Mitch . . . . Sincerely, Dick" letter in which Mack thanked Wolfson for gifts of "liquid refreshments" and "flowers . . . and delicacies" sent to Commissioner and Mrs. Mack. There is also evidence that various politically prominent Florida personages and Washington lawyers had made known their views to the Commission indirectly in support of Intervenor and in opposition to Appellant. I cannot take seriously any suggestion that this was exclusively the innocent activity of

[3] R. 7133-34.

public spirited citizens with no "ax to grind" after the sordid history of this case had become well known to Congress and the public. Indeed the Office of the General Counsel of the Commission, after detailed analysis of the evidence developed at the reopening hearing, concluded that principals of Florida-Georgia were "inextricably" involved in these activities and accordingly recommended Florida-Georgia's disqualification to the Commission. See Reply Brief for Appellant, pp. 2-3.

It has been rare for this court in its holdings, or even for individual members in dissent, to undertake re-examination of the weight of evidence before the Commission, and this process has been generally limited to situations where applicants engaged in grossly improper activities in pursuit of their applications. (See, e.g., *Massachusetts Bay Telecasters* v. *FCC,* 104 U.S.App.D.C. 226, 261 F. 2d 55 (1958); *WORZ, Inc.* v. *FCC,* 106 U.S.App.D.C. 14, 268 F. 2d 889 (1959), and other remand cases). But here the Commission has made a finding that one applicant is disqualified while another is given a "clean bill" in the face of evidence of ex parte contacts by the successful party at least as offensive as—and in my view worse than—those penalized by the Commission. My conclusions on "comparative misconduct" are not based on a re-evaluation of credibility of witnesses, for appellate judges are not free to engage in such excursions; credibility is for fact finders. Rather my conclusions rest on undisputed evidence; this is highlighted by the failure of the Commission even to ask Commissioner Mack for his version of the conversation with Herlong or whether he had been approached by anyone for the Wolfson group. The testimony of Congressman Herlong as to Commissioner Mack's statements to him stands unchallenged; the Commission did not in any way cast doubt on Herlong's testimony.[4] Mitchell Wolfson's

[4] The Commission neatly disposed of Mack's statement to Herlong by saying, "Commissioner Mack's statement to Congressman Herlong forms the basis of a finding only that he made the statement, and not as to its accuracy. With respect to Wolfson and Florida-Georgia, the statement is hearsay and incompetent to form the basis of a finding of fact." What astonishing sophistry! Indeed what impertinence! As a matter of technical evidence law, of course, Mack's statement would be admissible *against*

testimony can do no more than afford a basis for a finding —if he was believed—that he, *Wolfson,* secured no ex parte commitment from Mack. The circuitous methods of those who engage in backdoor communications with the Commission are all too familiar to us and the Commission's failure even to invite Mack to clear up this grave charge, which goes to the very heart of the disputed issue here, casts an indelible shadow over the entire process.

I repeat that I would not venture to balance the misconduct of Appellant against that of Intervenor for the purpose of giving the award to Appellant rather than Intervenor. But I can find no record basis for the Commission to hold that the rather bumbling and naive efforts of Appellant to find out who was "undermining its award" was evil beyond redemption, while Intervenor was blameless. Under a single standard of conduct both Appellant and Intervenor—or neither—should have been disqualified.

I would remand to the Commission with directions to vacate its award to the Intervenor and begin anew with both Intervenor and Appellant disqualified along with all shareholders of either who hold a substantial amount of stock. Only by such a process can we cleanse this award of its long and unsavory background.

---

him as a party admission, were he a litigant, but inadmissible (except in some jurisdictions) *against others* as not strictly a common-law "declaration against interest."

But the Commission is not bound by such nice evidentiary distinctions and indeed does not ordinarily stand on them; it is permitted—in fact *required* in the public interest—to consider reliable evidence which might be inadmissible in court. The statement attributed to Mack was quickly made a matter of public record by a member of the United States Congress whose version was not shaken by cross-examination at the Commission hearings. And certainly Mack's statement—amounting to a confession of misconduct on his part made to a close acquaintance—was not one to be lightly made. I am not impressed by the suggestion made by counsel for Intervenor at the hearings and adopted in the Commission's brief before us that Mack told a "little white lie" in order to be rid of an annoying phone call. Rubbish! Even if the Commission's hypersensitivity concerning hearsay could justify its refusal to give any weight to the Herlong-Mack incident as against Intervenor, its zeal for strict evidentiary niceties cannot excuse its failure to pursue the subject further by calling upon Mack for an explanation. Mack presumably did not make a commitment to the birds in the trees but to flesh and blood men.

APPENDIX B

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 10833 File No. BPCT—749

In re Applications of

CITY OF JACKSONVILLE, JACKSONVILLE, FLA.

Docket No. 10834 File No. BPCT—1624

FLORIDA-GEORGIA TELEVISION CO., INC., JACKSONVILLE, FLA.

Docket No. 10835 File No. BPCT—1625

JACKSONVILLE BROADCASTING CORP., JACKSONVILLE, FLA.

For Construction Permits for New Television Stations
(Channel 12)

DECISION

(Adopted September 11, 1963)

BY THE COMMISSION: COMMISSIONER LEE ABSENT;
COMMISSIONERS COX AND LOEVINGER NOT PARTICIPATING

PRELIMINARY STATEMENT

1. The history of this proceeding is set forth in paragraphs 1 and 2 of the initial decision of Hearing Examiners James D. Cunningham and Chester F. Naumowicz, Jr. (FCC 62D—34; mimeo No. 18568), released April 11, 1962, and will not be repeated. Briefly stated, the hearing was concerned with alleged ex parte conduct for and on behalf of the three parties named in the caption hereof in a 1954-56 comparative proceeding looking to the award of channel 12 in Jacksonville, Fla. In a hearing conducted in 1961, the hearing examiners found, concluded, and decided that the city of Jacksonville (City) by and through one of its commissioners had employed an attorney to make ex parte contacts and must therefore be held disqualified. It was fur-

ther held that Jacksonville Broadcasting Corp. (JBC) had likewise disqualified itself by making and attempting to make ex parte approaches to influence the Commission. As to Florida-Georgia Television Co., Inc. (Fla-Ga), the examiners found no evidence meriting an adverse conclusion concerning it. Nevertheless, the grant was held void ab initio by reason of the disqualification of Commissioner Mack for misconduct on his own part. Following release of the initial decision, exceptions and briefs were filed by the Office of General Counsel, Federal Communications Commission (OGC), JBC, and City. A statement in support, exceptions, and brief was filed by Fla-Ga. Replies were filed by all parties. Oral argument was held on February 14, 1963.

2. A motion to reopen record conditioned upon the actions of the Commission in evaluating the evidence was filed after initial decision by OGC on June 13, 1962, and an opposition thereto was filed by Fla-Ga. Motions requesting correction of transcript were filed on March 1, 1963, by JBC and City. A petition to accept motion requesting correction of transcript was filed by Fla-Ga on March 14, 1963, and a motion was concurrently lodged.[1]

Findings of Fact

We have examined the initial decision in the light of the record, the exceptions and briefs, and the arguments of the parties. Our rulings on exceptions are contained in the appendix hereto. Except as modified by such rulings, we adopt the examiners' findings of fact and incorporate them by reference as fully as if set forth at length herein.

Discussion

1. We shall first consider the motion to reopen record filed by OGC. In the course of this proceeding, a number

[1] The Commission being of the opinion that the corrections are proper, the ordering clauses will provide for corrections. We have likewise examined Fla-Ga's petition to accept late filing of the motion to correct transcript and, good cause having been shown, the relief requested will be granted. We have also examined Fla-Ga's motion to correct transcript, find it proper, and shall dispose of same in the ordering clauses.

of items of evidence were introduced concerning the admissibility of which there existed wide differences of opinion; e.g., the so-called "Mack Diary" (see I.D., footnote 15) and a memorandum from the files of Senator Spessard Holland of Florida (see I.D., finding 19(b) and footnote 18). In the text of the initial decision (par. 3 and footnote 2), the examiners discussed the desirability of striking certain evidence which they deemed nonprobative vis-a-vis permitting it to remain in the record and evaluating it for what they considered it to be worth. The technique adopted by the examiners was to permit such evidence to remain in the record, but to "ignore" an unspecified portion of it. OGC's motion was directed to reopening the record for the purpose of adducing the personal testimony of certain persons whose affidavits and the like OGC believed were ignored. The motion is not well founded. While we do not approve of indefinite comments on the quality of the evidence as made by the hearing examiners, believing it to be the better practice to comment and rule more specifically, the fact remains that the examiners did not strike such evidence from the record. It remained therein, available for our examination and we have examined it as set forth by our discussion in paragraph 2 below. OGC's motion is based on the premise that such evidence was stricken. Such not being the case, the motion will be denied and the ordering clause will so provide.

2. Considerable discussion during these proceedings was occasioned by the Federal "shopbook rule" (28 U.S.C. 1732). The problem may be summarized to the effect that (*a*) if certain records in the offices of former Commissioner Mack and U.S. Senator Spessard Holland of Florida (for example) were to be admitted in evidence, and (*b*) were to be accorded full credit for the recitals therein, (*c*) they would have established that persons (e.g., Foley, Spades, Simmons, etc.) having business or social relations with the principals of Fla-Ga had made contacts with the officials named in connection with the original comparative proceedings. Such contacts, in turn, might have been argued to have been of an improper ex parte nature. Had this conclusion been reached, it might have been further argued that

such contacts were known to, instigated by, or ratified by, the principals of Fla-Ga. From this state of affairs, conclusions adverse to Fla-Ga might have been drawn. With this argument in mind, we have scrupulously reexamined the material purportedly falling within the shopbook rule. We find that two areas of confusion prevailed in the proceeding before the hearing examiner—admissibility and weight. In our view since the Holland and Mack office records were maintained in the regular course of business, we hold that they were shopbooks and entitled to be admitted in evidence. A more difficult question is presented with respect to the weight to be accorded these entries. The extract from the office records of Senator Holland, no matter how regularly made, cannot be accorded any weight because the person who made the entry testified that he did not recognize Simmons' voice. Therefore, the most that the entry proves is that a person calling himself "Simmons" called Senator Holland's office. See Wigmore, *Evidence,* third ed., No. 2155. Contradicted by the testimony of Simmons himself, we cannot find that Simmons made such a call. The "Mack diary" entries, we find similarly trustworthy to prove that Foley and Spades made various visits to former Commissioner Mack's office. Indeed, except for vagueness as to dates, neither took issue with the fact that they were at the office on given dates. To the "purpose" column of the diary (i.e., that portion purporting to show the purpose of the visit or what was discussed), we can accord no weight. Testimony (e.g., FCC exhibit 83) clearly shows that the purpose entries were mainly educated guesses as to what the visitor called about, based on statements of the visitors, their business interests as generally known to the recorder, the subject matter of other visits, statements by third parties, etc.—which lend no reliability to the accuracy or correctness of the entries. When to this is added the fact that a reexamination of the record reveals no proof that the principals of Fla-Ga ever instigated or knew of the contacts by Simmons, Foley, or Spades (assuming arguendo that they were made), the shopbook entries become valueless.

3. We turn now to the question raised as to the qualifica-

tions of Jacksonville Broadcasting Corp. to participate in this proceeding as of January 21, 1963, it being alleged by Fla-Ga in a motion to strike notice of appearance that JBC had dissolved (except for certain limited purposes under Florida law) on December 27, 1960, and was no longer a party applicant before the Commission, although by an instrument dated October 10, 1960, JBC had assigned to Jacksonville Broadcasting Co. (a copartnership) all its assignable rights in the corporation's application. We disposed of this contention pro tem by a memorandum opinion and order of February 7, 1963 (FCC 63-118; 30678), wherein we permitted counsel for an entity styling itself "Jacksonville Broadcasting Corporation" to appear and argue exceptions as to the conduct of such corporation in the ex parte phases of this matter. We specifically declined to pass upon the corporation's continuing status, the validity of the assignment, whether the corporation or copartnership was a party applicant before the Commission, or any other aspect. In view of our decision, infra, concerning ex parte conduct by Jacksonville Broadcasting Corp., we find it unnecessary to pass upon any of these other questions. Since we have found JBC disqualified by reason of its conduct as of a date long antedating its dissolution, these remaining questions become moot.

4. A question as to the validity of the proceedings in toto was raised by Fla-Ga which contended that no action adverse to its grant could be taken by the Commission without compliance with 47 U.S.C. 312 (i.e., revocation). The examiners discussed this at length in conclusions 1-4 of the initial decision. The Commission recognizes that the status of the grant in this case approached nearer to a state of unreviewable finality (if such there be) than those in the other ex parte cases we have considered in recent years. However, since our decision, infra, is not adverse to Fla-Ga, we find it unnecessary to pass upon the questions raised by that party. We do not adopt the examiners' conclusions 1-4, not because we find them incorrect, as to which we refrain from opinion, but because we find them unnecessary.

5. Remaining to be discussed is our disagreement with the examiners' evaluation (see I.D. conclusion 9) of the

effect on City's qualifications of the misconduct of Commissioner J. Dillon Kennedy. The examiners found that Kennedy, an elected commissioner of the city of Jacksonville, had indulged in improper ex parte activities designed to further City's application. They further found (finding 12) "* * * Kennedy did not have authority to enter into the agreement with Draper, * * * and no other official of the city ratified, condoned, or knew of his negotiations and arrangements hereinabove found." However, they concluded (conclusion 9), "* * * City cannot escape the legal onus of these activities which were undertaken in its behalf. The innocence of the majority of the individuals associated with the City does not furnish cause for excusing or for the condonation of Kennedy's acts * * *," citing *WOKO* v. *FCC*.[2]

Unlike the examiners, we do not believe that the true question presented is "excusing or * * * condonation of Kennedy's acts." The question is, rather, whether his actions, which we believe were wrong, are to be imputed to the city. As shown by paragraphs 5 and 12 of the findings of fact of the initial decision, which we have adopted, Commissioner Kennedy's duties were limited to "supervision * * * [of] City's Electric and Water Departments, Municipal Docks and Terminals and its broadcast facilities" and even in connection with these prescribed duties he had no independent authority to do anything. See findings 4, 5, 12, and 13 of the 1956 Commission decision (12 R.R. 113 at 119 et seq.). No individual commissioner has the authority to act for the city, and all such action must be by a vote of the majority of the city commission.[3] Limited preliminary authority may be delegated to a particular commissioner subject to report to and ratification by the commission en banc. The minutes of the city commission reveal neither negotiation of any sort concerning Miles Draper and the city's television application, delegation to Commissioner Kennedy, nor ratification of Commissioner Ken-

---

[2] *In re WOKO, Inc.*, 10 FCC 454 (1944): reversed sub nom. *WOKO* v. *FCC* (C.A.D.C., 1946), 80 U.S. App. D.C. 333, 153 F. 2d 623; reversed sub nom. *FCC* v. *WOKO*, 329 U.S. 223, 91 L. Ed. 204, 67 S. Ct. 213 (1946).

[3] R. 6305, 6306, 6590, 6597, 6613.

nedy's agreements with Draper. For these reasons, the actions of Commissioner Kennedy were distinctly ultra vires. And while it is true that even an ultra vires act of this sort is subject to ratification and consequent liability on the part of the municipal corporation,[4] in this case it is clear that there was no subsequent ratification by or even knowledge (until public disclosure) of Kennedy's actions by the Commission. It is our further view that the marked limitations of Kennedy's authority also clearly distinguish this situation from *WOKO*. In *WOKO* an officer of the corporation had the duty and authority to file reports with this Commission, and after he filed untruthful reports, we imputed such wrongful conduct to the corporation in accordance with the basic principles of corporation law. In such cases, it is said, "* * * the officer is placed in such a position by the corporation that as its agent he has the power to commit the wrong, and therefore it should bear the burden of his wrongdoing."[5] For the foregoing reasons we affirm the examiner's findings as to the actions of Kennedy, but set aside the conclusions insofar as they impute such actions to City, or conclude that City is disqualified to be a Commission licensee.

Conclusions

1. Conclusions 1-4 of the initial decision are not adopted for the reasons set forth in paragraph 4, "Discussion," supra.

2. Conclusions 5 and 6 of the initial decision are adopted and incorporated by reference as fully as if set forth at length herein, except as changed by the ruling on city's exception 26.

3. Conclusion 7 of the initial decision is set aside, and in lieu thereof we conclude that in any further proceedings to be had in connection with the subject applications, JBC is disqualified from consideration because of attempts by individuals identified with it to influence the Commission

---

[4] *Salt Lake City* v. *Hollister*, 118 U.S. 256, 30 L. Ed. 176, 6 S. Ct. 1055 (1886).

[5] 13 AmJur, "Corporations," No. 1125; see also 43 A.L.R. 615.

through methods outside the recognized and public processes of adjudication. City and Fla-Ga, on the other hand, are not shown by the evidence to be disqualified from further consideration, and nothing in this record may be held to reflect adversely on their applications.

4. Conclusion 8 of the initial decision is adopted and incorporated by reference as fully as if set forth at length herein.

5. Conclusion 9 of the initial decision is specifically set aside for the reasons detailed in paragraph 5, "Discussion," supra. In lieu thereof we conclude that Kennedy's actions were ultra vires, unknown to the city commission or City, and not to be imputed thereto. City, therefore, remains qualified to be an applicant although its application has been withdrawn.

6. Conclusion 10 of the initial decision is adopted and incorporated by reference as fully as if set forth at length herein, except that in the penultimate sentence thereof the words ", as with J. Dillon Kennedy, *supra,*" are stricken, and following the penultimate sentence is added "*In re WKAT, Inc.*, 29 FCC 216, 17 R.R. 997 (1960); affirmed sub nom. *WKAT, Inc.* v. *FCC* (C.A.D.C., 1961), 111 U.S. App. D.C. 253, 296 F. 2d 375, 21 R.R. 2100."

7. Conclusion 11 of the initial decision is adopted and incorporated by reference as fully as if set forth at length herein.

8. Conclusion 12 of the initial decision is stricken and in lieu thereof, in the light of the conclusion as to the disqualification of JBC, we affirm the examiners' denial of a petition to amend its application, filed May 8, 1961.

9. Conclusions 13, 14, and 15 of the initial decision are adopted and incorporated by reference as fully as if set forth at length herein, except that the parenthetical material at the end of conclusion 13 is stricken, and conclusion 14 is amended to add following the words "* * * interested citizen * * *," the words "who was acquainted with and held the principals of Fla-Ga in personal regard."

10. Conclusions 16 and 17 of the initial decision are not adopted as inappropriate to the Commission decision.

Accordingly, *It is ordered,* This 11th day of September

1963, that the grant of a television construction permit to Florida-Georgia Television Co., Inc., as embodied in the Commission's decision released August 31, 1956 (FCC 56-800; mimeo No. 34118), *Is void and it is hereby set aside;* that Jacksonville Broadcasting Corp. *Is disqualified* from receiving a grant of its application; that the denial by the examiners of the petition of Jacksonville Broadcasting Corp., filed May 8, 1961, to amend its application, *Is affirmed;* that the motion to reopen record filed by Office of General Counsel on June 13, 1962, *Is denied;* and

It is further ordered, That the motions requesting correction of transcript filed by Jacksonville Broadcasting Corp. and City of Jacksonville *Are granted* and the transcript *Is ordered corrected accordingly;* that the petition to accept motion requesting correction of transcript filed by Florida-Georgia Television Co., Inc., *Is granted* and the Secretary *Is authorized and directed to file* the motion requesting correction of transcript lodged by Florida-Georgia Television Co., Inc.; and the said motion of Florida-Georgia *Is granted* and the transcript *Is ordered corrected accordingly;* and

Upon a complete review of the entire record, *It is further ordered,* That the Commission's decision of August 31, 1965, insofar as it granted a construction permit to Florida-Georgia Television Co., Inc., *Is nunc pro tunc readopted;* the Commission's grants of station licenses on September 20, 1957, and February 12, 1958, *Are nunc pro tunc, affirmed;* and the application of Florida-Georgia Television Co., Inc., for renewal of television station license for WFGA-TV, Jacksonville, Fla., filed November 30, 1960, insofar as it has been continued in a deferred status by reason of the questions raised in this proceeding, *Is removed* from such deferred status, without prejudice to any other causes for deferral imposed by Commission processes.

APPENDIX

Rulings on Exceptions of City of Jacksonville

Exception No.	*Ruling*
1, 16, 17, 23, 24	Denied. The existing decision adequately reflects the finding contended for.
2, 8, 9, 13, 21	Denied. Of no decisional significance.
3, 4, 5, 6, 7, 12, 14, 18, 19, 27	Denied. On conflicting evidence the trier of fact has found or concluded to the contrary and the Commission concurs.
10, 11	Granted to the extent of deleting from finding 6 the words "to ascertain if there was political activity"; denied as to the remainder as adequately reflected in the initial decision.
15	Denied, as to the first sentence for the reasons stated in ruling on exception 14; denied as to the remainder as exceptions properly run to facts—not inferences.
20	Denied, as to the first sentence for the reason given in ruling on exception 3; denied as to the remainder as of no decisional significance.
22	Denied as exceptions properly run to facts—not inferences.
25	Granted and finding 26 is amended by deleting from the third sentence the words "the three applicants" and substituting the words "Florida-Georgia and JBC."
26	Granted and conclusion 5 is amended by deleting from the second sentence the words "the three applications" and substituting the words "Florida-Georgia and JBC".
28, 29, 30	Granted in substance.

Rulings on Exceptions of Florida-Georgia Television Co., Inc.

1	Denied. Of no decisional significance.
2, 4	Denied. The decision adequately reflects the evidence.
3	Denied. The sought finding would be a superfluous reproduction of evidence.
5	Denied. Immaterial.
6, 7, 8, 17, 18	Denied. Moot in view of par. 2, "Discussion."
9, 10, 19	Granted in substance. See exception 4(a), OGC.
11	Denied. Mr. Conroy's subjective impressions are irrelevant and immaterial.
12	Denied. Congressman Herlong's speculations are irrelevant and immaterial.
13	Denied. Moot in view of the decision herein. See par. 4, "Discussion."
14, 15, 20	Denied. The Commission concurs with the examiners.
16	Denied. Exceptor has no right to a particular line of reasoning.
21, 22	Denied. Moot in view of the decision herein.

Rulings on Exceptions of Jacksonville Broadcasting Corp.

1	Denied. Exceptions must run to the examiner's findings and/or conclusions—not the explicitness with which his reasoning is set forth.
2, 3	Denied. 47 CFR 1.154(a) not complied with.
4, 7, 8, 9, 10, 11, 14, 15, 16, 23.	Denied. Moot in view of the Commission's decision, see par. 2, "Discussion."

Exception No.	*Ruling*
5, 12, 17, 21, 24, 25, 34	Denied. On conflicting evidence the trier of fact has found or concluded to the contrary and the Commission concurs. Further, the exceptions in some respects lack specificity (47 CFR 1.154(a)), transcript references are argumentative, and postulate as facts, items not proven.
6	Denied. 47 CFR 1.154(a) not complied with (lack of specificity, lack of transcript references, argumentative)
18, 30	Denied. The finding complained of adequately reflects the evidence.
19	Denied. The trier of fact saw and heard the witness. Exceptor's reasons are nonspecific and a non sequitur.
20	Denied. Simmons *did* so deny. The trier of fact believed the witness and, on conflicting testimony, the Commission concurs.
22	Denied, as to the first portion for the reasons stated under exception 4; denied, as to the second portion because neither Senator Holland nor Ralph Davis is competent to draw the conclusion of law re the shopbook rule, and further, neither testified to the facts claimed.
26, 27, 28, 29	Denied as cumulative of exceptions hereinbefore ruled on and as lacking in specificity.
31	Denied. The excepted-to "finding" is an evaluation.
32	Denied. If the conclusion be satisfactory to exceptor, he has no right to a specific line of reasoning.
33	Denied. Argumentative. 47 CFR 1.154(a) not complied with.
35	Denied as argumentative, cumulative, lacking transcript references, and bottomed on an erroneous view of the law; i.e., that ex parte contacts are proper if other parties are also making them.
13	[There is no exception so numbered.]
	Rulings on Exceptions of Office of General Counsel
1(a), 1(e), 1(i)	Denied, for lack of specificity.
1(b)	Denied. The evidence referred to remains in the record and has been considered and evaluated by the Commission—it was not stricken.
1(c) (1), 1(c) (2), 1(c) (3).	Denied. The evidentiary material was not excluded.
1(d)	Denied. The examiner's evaluation was an ad hoc determination that certain evidence did not warrant findings; not a ruling that such type of evidence cannot so warrant.
1(f), 1(g), 1(h), 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 3(a), 4(b), 4(c).	Denied as moot in view of the Commission decision, see par. 2, "Discussion."
3(b), 5(a), 5(b), 5(c), 7(a), 7(b), 8(a).	Denied. On conflicting evidence the trier of fact has found or concluded to the contrary and the Commission concurs.
3(c)	Denied as to all but the last subsection as moot, see ruling on exception 1(f) et al, supra; denied as to the last subsection as of no decisional significance.

Exception No.	*Ruling*
4(a)	Granted to the extent that the words "introductions of its corporate officials to" in finding 19(c) are stricken and the words "making some contacts with" are substituted.
5(d)	Granted. See conclusion 9 herein.
5(e)	Denied as to the first 2 subsections as lacking decisional significance in view of Chase's testimony; denied as to the third and fourth subsections as lacking decisional significance; denied as to the last subsection as contrary to the examiner's finding on conflicting evidence, with which finding we concur.
6(a)	Denied on the ground that "business" was never clearly defined in the record.
6(b)	Denied. The cited material might have supported a different evaluation of Simmons' credibility by the examiner—it does not compel it.
6(c)	Denied. The overwhelming bulk of testimony must be based on "recollection," absent written records, *alibi*, impossibility, etc., and it is a valid basis for such testimony.
6(d)	Denied. There is no evidence in the record contradicting the fact that Simmons conducted an insurance survey and was paid for it. Impeaching evidence and/or examination may only affect the weight of the evidence in chief. It cannot affirmatively establish anything, whether successful or not.
6(e)	Denied. The fact of Simmons' having made the phone call not being established, the remainder of the sought findings are immaterial.
8(a)	Denied. The cited factors might permit the inference sought by exceptor but do not compel it. The Commission concurs with the examiners.
8(b)	Denied. The several conflicting versions of the Holtz-Jones interview, coupled with Jones' explanations during testimony, permit several inferences and do not compel that sought by the exceptor. For the reasons set out in conclusion 9, supra, the Commission declined to conclude ultimately adversely to Florida-Georgia.
9	Denied, for reasons set forth in par. 2, "Discussion."
10, 11	Denied. In view of the ultimate conclusion to the end sought by exceptor, he has no right to a specific line of reasoning.

APPENDIX C

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 10833 File No. BPCT-749

In re Applications of

CITY OF JACKSONVILLE, JACKSONVILLE, FLA.

Docket No. 10834 File No. BPCT-1624

FLORIDA-GEORGIA TELEVISION CO., INC., JACKSONVILLE, FLA.

Docket No. 10835 File No. BPCT-1625

JACKSONVILLE BROADCASTING CORP., JACKSONVILLE, FLA.

For Construction Permits for New Television Stations
(Channel 12)

INITIAL DECISION OF HEARING EXAMINERS JAMES D. CUNNINGHAM AND CHESTER F. NAUMOWICZ, JR.

(Adopted April 9, 1962)

PRELIMINARY STATEMENT

1. This is a proceeding on remand involving the above-entitled applications which was instituted by the Commission for the reasons hereinafter shown. Briefly summarized, the original actions taken with regard to these applications are as follows: On April 4, 1955, Hearing Examiner Charles J. Frederick released an initial decision looking toward a grant of the application of Jacksonville Broadcasting Corp. (JBC) for construction permit to establish a new television broadcast station (channel 12) at Jacksonville, Fla., and a denial of the competing applications of City of Jacksonville (City) and Florida-Georgia Television Co., Inc. (Florida-Georgia), for the same facilities; on August 31, 1956, following oral argument on exceptions to the initial decision, the Commission released its final decision granting the Florida-Georgia application and denying those of JBC and City; a license, pursuant to construction

permit, was issued Florida-Georgia on September 20, 1957, and renewed on February 12, 1958; a modified license was issued on May 22, 1959, expiring February 1, 1961. Action on the application of Florida-Georgia for renewal of the modified license has been deferred. It is now operating the facility under the call letters WFGA-TV.

2. In an order released August 2, 1960, the Commission, upon consideration of testimony adduced before the Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives, as related to the question of possible ex parte representations made during the course of the above-entitled proceeding, reopened the case and remanded it for further hearing on the following issues:

1. To determine whether any of the members of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on channel 12 in Jacksonville.

2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings resulting in the award of the construction permit for channel 12, Jacksonville, in any manner whatsoever except by the recognized and public processes of adjudication.

3. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for channel 12 in Jacksonville directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings.

4. To determine, in the light of the facts adduced upon the foregoing issues, whether the grant heretofore made of a construction permit for channel 12, Jacksonville, was void ab initio, and if not, whether such grant is voidable and action should be taken to set it aside; whether any of the applicants in this proceeding was and is disqualified to receive a grant of its application; and whether the conduct of any appli-

cant, if not of a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

The hearing order permitted all parties to the original proceeding to participate in the remand proceeding, afforded an opportunity to any persons concerning whom evidence might be received to cross-examine and to submit rebuttal testimony, and authorized participation by the Attorney General of the United States as amicus curiae. The hearing so ordered was concluded on December 21, 1961.[1]

3. While the instant proceeding is cast in an adjudicatory format wherein substantial rights of the parties are to be determined, to some extent it partakes of an investigatory proceeding requiring Commission counsel to explore the issues largely through the evidence of witnesses who are at least technically hostile in that the issues contemplate the possibility of conclusions adverse to their own or their associates' interests. Accordingly, an extremely liberal policy was adopted by the presiding hearing examiner as to the admission of evidence, and, over objection, a number of exhibits and a considerable volume of testimony were received, although the customary foundation establishing their competence and relevancy had not been laid. This was deemed an appropriate exercise of the hearing examiner's discretion to govern the order of proof, in view of the peculiar problems confronting Commission counsel charged with presenting the case. However, a departure from the customary order of proof did not obviate the necessity for the establishment at some point in the hearing of that qualifying foundation which would ordinarily have been required prior to the adduction of specific items of substantive evidence, for "if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed." *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580. Therefore, to the

[1] In the interest of expediting final disposition of the proceeding, all parties thereto agreed that, in the preparation of this initial decision, Hearing Examiner Chester F. Naumowicz, Jr., would assist Hearing Examiner James D. Cunningham who presided in the said proceeding.

extent that the subsequent course of the hearing supplied the lacking foundation for such evidence, it has been considered in reaching the findings of fact which follow. Of necessity, the substantial volume of testimony not subsequently connected up as competent and relevant has been ignored.[2] This procedure rendered infeasible the conventional technique of entertaining and ruling on motions to strike unqualified testimony subsequent to the closing of the parties' cases, for the scope of such motions would, of necessity, have been directed to the entire record, requiring the examiner to have permitted extended delays for the preparation of and reply to the motions, as well as the delay inherent in the detailed study by the examiner of the complete record prior to its closing. Such delays could not be countenanced in a proceeding of this type, and it is believed that the procedure which has been followed is the most likely to insure the public interest in the expeditious disposition of this case while, at the same time, guaranteeing to the parties the substantive protections to which due process of law entitles them.

Findings of Fact

4. On February 6, 1956, the Commission heard oral argument on the parties' exceptions to the initial decision in this proceeding, and, subsequently, issued instructions to its

---

[2] This is not to suggest that the technical rules of evidence have been applied strictly. The common law rules of evidence are relaxed in administrative hearings, and evidence which might be inadmissible in the more formal context of a judicial proceeding may be admitted in an administrative hearing if it is inherently credible. However, the abjuration of the common law rules of evidence is not tantamount to an abandonment of the philosophy and experience which underlie those rules, and administrative officers cannot base their decisions on testimony which is essentially speculative or directed to matters outside the ken of the witness in the absence of surrounding circumstances lending support and credibility thereto. That is, technically inadmissible evidence may be admitted only in a factual situation which lends it an aurora of probability. To the extent that any parties' proposed findings of fact have been rejected because they rely for material findings on evidence which the hearing examiners deem unavailable for consideration, a brief explanation for the reasons therefor is included in the text of the initial decision.

Office of Opinions and Review[3] to prepare a decision granting the application of JBC and denying the applications of Florida-Georgia and City. On June 27, 1956, the Commission considered a draft decision prepared in accordance with its instructions and deferred action thereon. It was again considered on July 5, 1956, at which time the Commission issued further instructions for the preparation of a revised decision granting the Florida-Georgia application and denying the applications of JBC and City.[4] The revised draft decision was considered by the Commission on July 18, 1956, but action was not taken. On August 29, 1956, the Commission adopted the revised draft decision granting the Florida-Georgia application,[5] together with an order denying a petition for rulemaking and request for stay of final decision which had been filed by JBC. On August 1, 1957, the Commission adopted an order denying a petition by JBC for reconsideration and other relief.[6]

City of Jacksonville

5. J. Dillon Kennedy has served as commissioner of the city of Jacksonville for the past 13 years. He is designated utilities commissioner[7] and under his immediate super-

---

[3] At that time, the Office of Opinions and Review was constituted pursuant to the provisions of then 47 U.S.C. 5(c), and functioned, insofar as here pertinent, "to assist the Commission in cases of adjudication—by preparing for the Commission or any member or members thereof, without recommendations and in accordance with specific directions—memoranda, opinions, decisions, and orders." Thus, the Office served as the scrivener of the Commission's intent, translating the Commission's ultimate decision and its basic reasons therefor into the form of a finished decision.

[4] Commissioners McConnaughey (Chairman), Hyde, Doerfer, Lee, and Mack voted for the revised instructions. Commissioner Bartley favored adoption of the draft decision granting JBC, and Commissioner Craven abstained.

[5] Commissioners Hyde, Doerfer, Lee, and Mack voted for adoption of the decision. Commissioners McConnaughey (Chairman), and Bartley dissented in favor of JBC, and Commissioner Craven abstained.

[6] Commissioners Doerfer (Chairman), Hyde, and Mack voted for adoption of the order. Commissioners Bartley and Lee dissented and Commissioner Craven abstained.

[7] It is the practice of the city commission of Jacksonville to designate certain of its five members to supervise various aspects of the administration of the city's affairs. Commissioners so designated do not require

vision are the city's electric and water departments, municipal docks and terminals, and its broadcast facilities. During February of 1955, Kennedy met with Miles H. Draper, a Tampa, Fla., attorney and longtime friend. In the course of their conversation on this occasion, Kennedy spoke of rumors that politics entered into the granting of television licenses, and, specifically, that JBC was attempting to bring political pressures to bear upon the Commission in favor of its application in this proceeding.[8] Kennedy, who was aware of Draper's extensive political acquaintance, asked him to investigate and to "neutralize" these pressures. In effect, his instructions to Draper were that if, as a result of this investigation, Draper's judgment was that political pressures were being brought to bear upon the Commission in the matter, he should attempt to utilize the same type of pressures in behalf of the city to induce the Commission to act favorably upon its application. Thus, Draper was given plenary authority and unlimited discretion to engage in these political activities by the city commissioner who was primarily and directly concerned with, and responsible for, the prosecution of the city's application. It was understood between the two men that Draper, in accomplishing the objective, might associate with one of his Washington contacts, and a fee of $5,000 was agreed upon for the service. However, the agreement at this time was tentative and action by Draper was to await the release of the initial decision of the hearing examiner who had presided in the comparative proceeding. At the time of these negotiations, the city was represented of record by a firm of Washington attorneys.

6. Following his talk with Kennedy, but prior to the release of the initial decision on April 4, 1955, Draper com-

---

individual executive or administrative control over their departments, but they undertake to familiarize themselves with the day-to-day operations of their departments and to submit recommendations to the city commission as a whole and such recommendations are subject to the majority vote of the commission. No commissioner can, on his own initiative, bind the city or exercise the authority of the commission.

[8] Such rumors are considered only to the extent that they furnish background for and tend to explain the actions of the individuals mentioned herein and not as establishing their truth.

municated with Harlan L. Kays, a Washington attorney, and related to him the substance of the conversation and tentative agreement with Kennedy. Draper was aware that Kays had formerly served on the staff of a Member of Congress and of his wide acquaintance in political circles in Washington. The tasks outlined for Kays were to attempt to familiarize himself with the proceeding; to ascertain if there was political activity; and to keep Draper advised of all procedural and administrative aspects of the matter. Kays agreed to accept the employment, subject to Kennedy's final commitment after issuance of the initial decision, and he agreed further that the $5,000 fee would be divided evenly after expenses were deducted.

7. Prior to the release of the initial decision, supra, and between the date of its release and September 9, 1955, Draper wrote Kennedy on several occasions asking for his final word as to the employment and advising that his contact in Washington "is ready to take action when properly advised." On September 13, 1955, Kennedy and Draper met in Tampa, Fla., and a verbal operative agreement was consummated pursuant to the terms of their discussion in February 1955, supra. Draper notified Kays of this promptly and accompanied him to the Commission's offices in Washington for the purpose of ascertaining the steps necessary to gain his admission to practice before the Commission and of introducing him to Commissioner Richard A. Mack.[9] Failing to locate Mack, the two men, without invitation or appointment, proceeded to the office of Commissioner Rosel H. Hyde. Kays, who had met the Commissioner once previously, introduced Draper. They advised him of their interest in the Jacksonville case, but made no attempt to discuss its merits. However, they did ask if they might keep informed of the procedural aspects of the matter through his office. The Commissioner referred their routine request to members of his staff.

8. About 1 week later, Kays returned to Commissioner Mack's office and introduced himself to the Commissioner

[9] Prior thereto, Kays' only activity had been to inquire at the office of the Commission's Secretary as to when the release of the initial decision was expected.

on the strength of his earlier call in the company of Mack's friend, Miles H. Draper. He advised Mack that he was interested in the Jacksonville television contest, although he did not identify the applicant he was representing [10] and there was no discussion of the merits. Mack's staff directed him to the appropriate Commission personnel in connection with his desire to be admitted to practice.

9. Prior to the release of the Commission's final decision, Kays called at the offices of the Commission on 8 or 10 occasions and spoke to Commissioners Mack or Hyde or members of their staffs. His conversations were limited to matters of procedure, viz, questions such as whether the Commission's decision had been released, etc., and he secured no information which was not available to anyone who might inquire at the office of the Commission's Secretary. There is no evidence that he discussed the merits of the case with either of these Commissioners or with any other member of the Commission or its staff and it is so found.

10. Draper's only additional contact at the Commission was on the day of oral argument on exceptions to the initial decision. At that time he encountered Mack in the hall and engaged in a perfunctory conversation unrelated to the merits of the proceeding. However, he did make one call at the White House where he spoke to a person he was unable to identify, and two calls at the Republican National Committee, during one of which he spoke to the chairman. At both locations he was told that no attempt was being made to exercise political pressures in television cases in general or in the Jacksonville case in particular.

11. Following the Kennedy-Draper agreement of September 1955, Draper made numerous telephone calls and addressed communications to Kennedy with respect to his $5,000 fee for what he called "legal services." Kennedy ignored these claims until early in March of 1956, when he discussed them with his friend George B. Hills, a Florida businessman. Kennedy denied to Hills that he had retained Draper or agreed to pay him, but, after investigating the situation, Hills advised Kennedy to satisfy Draper's claim,

---

[10] Subsequently, Kays mentioned to a member of Commissioner Mack's staff that he and Draper were representing the city of Jacksonville.

and, in view of his friendship with Kennedy, committed his firm to furnish the money. Hills then gave Kennedy $2,500 in cash, and on March 24, 1956, Kennedy paid this to Draper. Shortly thereafter, Draper pressed for the balance, and on September 24, 1956, wrote Hills' firm (Reynolds, Smith & Hills), stating that Kennedy had refused to respond to his billings and requesting the firm to pay the account. On October 1, 1956, Reynolds, Smith & Hills issued a check in the sum of $2,500 to Draper. After deduction of certain expenses, Draper split the total amount with Kays, who received two payments of approximately $1,200 each. The calls at the White House and the Republican National Committee, in Draper's view, justified his fee, for he believed he was being paid because his acquaintanceship among influential political figures in Washington was such that he could obtain information from sources unavailable to the ordinary individual.

12. As a city commissioner of Jacksonville, Kennedy did not have authority to enter into the agreement with Draper, [11] and no other official of the city ratified, condoned, or knew of his negotiations and arrangements hereinabove found.

13. The city is no longer desirous of prosecuting its application; it does not wish to be considered a current applicant; and its participation in the remand proceeding is in order to cooperate with the Commission's inquiry into the matter of the original grant herein.

Florida-Georgia Television Co., Inc.

14. At the time the applications were pending before the Commission, George H. Hodges was president, director, and a substantial stockholder in Florida-Georgia. He was the corporate official most intimately concerned with the prosecution of the Florida-Georgia application. It is here found from the evidence that he never personally contacted any member of the Commission in connection with the case; that he did not seek to have anyone intercede therein; and

[11] There was no direct arrangement between Kennedy and Kays, although Kennedy was aware that Draper had associated himself with a Washington attorney in the matter.

that he was unaware of any improper contacts being made. The same findings are appropriate with regard to the remaining officials of this applicant.

15. Hodges numbered Randall Chase, a Florida businessman, among his personal friends. They had served together on several corporate boards. Chase was also acquainted with business associates of Hodges who assisted in the ultimate construction of station WFGA-TV, and, on occasion, he engaged in casual conversations with these individuals relative to the application of Florida-Georgia Television Co., Inc. On July 14, 1955, Chase sent a letter to Commissioner Mack, with whom he had a slight and casual acquaintance from dealings with the Florida Railroad and Public Utilities Commission of which Mack had formerly been a member, advocating favorable consideration of the Florida-Georgia application. The evidence of record indicates nothing more than that the letter in question was forwarded to the Commissioner by virtue of Chase's interest as a resident of the station's proposed service area, and it cannot here be found that it was prepared at the behest of Hodges or any of his associates in the Florida-Georgia application. Neither Hodges, nor any of the Florida-Georgia principals, had knowledge of this letter until a date subsequent to the final disposition of the Jacksonville applications.[12]

16. Lester W. Foley, a Jacksonville businessman, is president of Beiswenger, Hoch & Associates, Inc., an engineering firm which did preliminary survey work on the Florida-Georgia television tower, for which it was paid the sum of $2,070.42.[13] He is a personal friend of Hodges and

---

[12] A contrary finding based on the fact that subsequent contacts between Chase and principals of Florida-Georgia afforded an opportunity for discussion of the letter would be unwarranted, absent some evidence that such opportunities were, in fact, so utilized, for such a finding would rest on mere conjecture.

[13] The record is ambiguous as to the itemization of this billing. The Office of General Counsel urges a finding that an item of $355.67 listed as "travel" represented reimbursement for the expenses incurred by Foley and Cyril C. Spades (infra) on a trip to Washington to visit Commissioner Mack. However, although the record fails to establish this sum as a legitimate expense, the total lack of evidence as to what the sum was expended for would render such a finding completely conjectural.

a casual friend of Commissioner Mack whom he saw in Washington during the spring of 1956 in connection with a matter unrelated to the Jacksonville television proceeding.[14] As an incident of this conversation, Foley inquired how things were going in the Jacksonville case. Mack informed him that the matter was proceeding routinely. He saw Commissioner Mack again a short time later and introduced Cyril C. Spades, a Florida politician and one of Foley's business associates. There is no acceptable evidence of a discussion of the Jacksonville proceeding on this occasion and it is so found. Foley telephoned Mack about a month after the second meeting in an attempt to arrange a social appointment, which never developed. The record contains no evidence of any improper discussion between Foley or Spades and any member of the Commission;[15] no evidence to indicate that any official of Florida-Georgia requested Foley or Spades to make an ex parte approach to a member of the Commission; and no evidence that Foley or Spades advised any official of Florida-Georgia Television Co. of their unrelated conversations with Commissioner Mack. It is here found accordingly.

17. Cyril C. Spades, at the time the applications herein were pending before the Commission, was Republican national committeeman of Florida. He was periodically employed by Beiswenger, Hoch & Associates, Inc., on a per diem basis to assist in the procurement of Government contracts. On the day Commissioner Robert E. Lee's original appointment to the Commission was confirmed, and before commencement of the original hearings in the

[14] Foley's business activities necessitated frequent trips to Washington, D.C.

[15] The so-called "Mack Diary," a record of office activities kept by Commissioner Mack's office staff, states that Foley's visits with Mack in the spring of 1956 were in connection with the Jacksonville TV proceeding. However, the evidence shows that the "diary" was not necessarily composed, with respect to specific items, at Commissioner Mack's direction, and the person making any individual entry would not necessarily know the purpose of the call but might merely guess thereat. Under such circumstances, the "diary" must be regarded as without evidentiary weight in establishing the purpose of Mr. Foley's calls. It is to be observed, in this connection, that mere diary entries standing alone would not furnish a proper evidentiary foundation for findings of improper ex parte contacts.

proceeding, Spades called on him to offer congratulations. In the course of their conversation, a reference was made to the Jacksonville proceeding, and, although Commissioner Lee explained that he had no opinion in the matter and that the hearing had not been held, he was unaware of any substantial number of municipalities which had received television licenses. In light of the immediate chronological proximity of this conversation to Commissioner Lee's appointment to the Commission and his obvious unawareness of the facts of the case at the time, this remark must be construed as a general observation rather than a hint as to his own or the Commission's views with respect to the application of the city of Jacksonville. At the time of this conversation, Spades favored a grant to the city, although he did not mention this fact to Commissioner Lee, and his preference was a personal one which did not stem from an attempt on the part of any city official to secure his assistance.

18. Some time later, Spades again called on Commissioner Lee. Although not contacted by any of the applicants in the case or their representatives, his sympathies had swung over to the Florida-Georgia application. He regarded City's proposal as having no real chance of success, and, because one of the principals in JBC was actively engaged in political enterprises on behalf of the Democratic Party, he preferred Florida-Georgia through a process of elimination. When Spades "practically indicated" to Commissioner Lee that he favored the Florida-Georgia application, the Commissioner refused to discuss the matter and summarily dismissed him from his office. There is no evidence indicating that Florida-Georgia, or any of its officials, solicited, knew of, or condoned Spades' attempt to discuss the case with Commissioner Lee, or, in fact, that any significant relationship existed between Spades and Florida-Georgia or its principals, and it is so found.

19. Evidence from or concerning a number of other individuals connected, or purportedly connected, with the Florida-Georgia application was adduced. While each particular piece of this evidence suffers from a lack of

relevance, materiality, or competence, the major portions thereof are briefly summarized in the interest of a more complete initial decision.

(*a*) Harold S. Cohn is a director and stockholder of Florida-Georgia. Alfred W. Jones is a former stockholder of the corporation. There is no evidence that either of them contacted any member of the Commission or had any knowledge of any contacts being made by anyone else and it is so found.

(*b*) Guy L. Simmons, a personal friend of Hodges, with whom Hodges discussed the television application, is a Jacksonville real estate and insurance broker who wrote a small insurance policy for this applicant, [16] and who also conducted, and was paid $500 for, an insurance survey for the corporation. From 1937 to late June of 1955, he was a city commissioner of Jacksonville. A record in the office of Senator Spessard Holland of Florida indicates that on June 10, 1955, a call was received from "Guy Simmons, city manager of Jacksonville," [17] stating that the city's application was no longer in the contest, and expressing the hope that the Senator would lend his support to the Florida-Georgia application.[18] The Senator's office record also

[16] The coverage involved a fidelity bond and was written on Dec. 19, 1957. On Feb. 24, 1958, the policy was canceled and a new policy underwriting increased coverage was issued in lieu thereof with a slight increase in premium. Simmons' failure to recall this substitution of policies does not impair his credibility as a witness, it not being shown to be a matter of significance or any motive being assigned as to why he would deliberately conceal this information after freely admitting that he wrote the original policy.

[17] Simmons never occupied the position of city manager of Jacksonville.

[18] The record in the Senator's files cannot be used independently as the basis of any finding beyond the fact that such a call was received in the Senator's office. Thus, it may not independently form the basis of a finding that Simmons made the call. Although the foundation testimony established the record as a regular and routine entry in the Senator's file, thereby possibly qualifying it for admission under the philosophy of the "shopbook rule," the failure of the foundation testimony to establish that the person who received the call or who prepared the record was able to identify Simmons' voice, or otherwise authenticate the identity of the caller, renders the record hearsay and incompetent to prove the fact of who made the call.

indicates that he declined to interfere in the matter. Simmons denies having made the call or having called the Senator's office at any time.

(*c*) Msgr. Maurice S. Sheehy, who served as a chaplain at Jacksonville Naval Air Station during World War II, is a personal friend of Hodges of Florida-Georgia, Stockton of JBC, and Foley of Beiswenger, Hoch & Associates. Prior to the adjudicatory phase of this proceeding, Florida-Georgia encountered difficulty in obtaining airspace clearance for its tower because of objections of the U.S. Navy. At Foley's request, Monsignor Sheehy assisted the applicant by arranging introductions of its corporate officials to Navy personnel with whom he was acquainted, his purpose being to insure, if possible, that the Florida-Georgia tower proposal would receive a fair audience.[19] The Navy's objections to the installation were ultimately withdrawn, and the tower received airspace clearance. In July of 1956, Monsignor Sheehy held the view that the city application had no real chance of success, and communicated to Hodges and Stockton a suggestion that they reconcile their contest through a merger whereby each of their groups would acquire a 50-percent interest in the television facility involved. This record contains no evidence warranting a finding of any improper activity on Monsignor Sheehy's part, his role having been undertaken in good faith and confined to the courtesy of introducing individuals whose employment was about to bring them into contact, and of endeavoring to act as peacemaker between two of his friends whose business interests conflicted. This activity not having been found improper, it follows that no adverse findings with respect to any applicant can be predicated thereon.[20]

---

[19] Monsignor Sheehy did not regard his courtesy to Florida-Georgia as indicating partisanship, and "would have been glad to have given the same assistance with the Navy to Mr. Stockton if he had asked."

[20] The evidence as to Monsignor Sheehy would not support a finding, as requested by certain of the parties, that while the case was pending before the Commission, Messrs. Spades and Foley were circulating in Washington

Jacksonville Broadcasting Corp.

20. At the time the subject applications were being prosecuted before the Commission, James R. Stockton was president, director, and a 60-percent stockholder of JBC.[21] Some time after the corporation's application was filed in June of 1952, he called on Senators Holland and Smathers and Representative Bennett of Florida and requested them not to take sides in the comparative hearing. On March 1, 1956, shortly after oral argument on exceptions to the initial decision of the presiding hearing ex-

---

a newspaper advertisement calculated to excite political prejudice against Stockton of JBC. While Mr. Stockton testified that Monsignor Sheehy told him that Spades and Foley were displaying this advertisement, Stockton's testimony was, of course, hearsay, and it was unsupported by any circumstantial evidence or testimony which might tend to lend it credibility. Monsignor Sheehy mentions in the record a vague recollection of having seen the advertisement, but does not place it in the possession of Spades and Foley; and he deleted a reference to Spades and Foley in connection with the advertisement which was contained in a proposed affidavit submitted to him by the Commission counsel charged with the prosecution of this case. Both Spades and Foley deny any association with the subject advertisement. Thus, Stockton's statement is denied by the actors it concerned and impliedly rejected by the witness whom Stockton alleged had knowledge of and told him of their acts. Such hearsay testimony does not meet the test of inherent credibility referred to in par. 3, supra, and cannot form the basis of a finding of fact.

[21] During the original hearings in this case, the stock of JBC was held as follows: Stockton, 60 percent; Robert R. Feagin, 20 percent; and Stockton, Whatley, Davin & Co., a corporation, 20 percent. On Oct. 31, 1957, Stockton, Whatley, Davin & Co. surrendered its stock and thereafter Stockton owned 75 percent of JBC and Feagin 25 percent. On Oct. 10, 1960, subsequent to the commencement of the reopened proceedings herein, Stockton and Feagin formed a partnership, 75 and 25 percent, respectively, and acquired from JBC the rights to its channel 12 application. On Dec. 27, 1960, JBC was dissolved. On Mar. 23, 1961, the partnership entered into an agreement with Stockton, Whatley, Davin & Co., which provided for participation in the reopened proceeding, and ownership interests in the event the ultimate result of this proceeding should be a grant to them, in the same relative percentage as their original stock ownership in JBC. A petition to amend the JBC application to reflect these changes will be disposed of infra.

aminer, he again called on Senator Smathers and requested him to urge the Commission to expedite its final decision.[22]

21. During the latter part of June 1956, while vacationing in Canada, Stockton was advised of the Commission's action of June 27, 1956, deferring action on the draft decision which would have granted the JBC application.[23] As a result, he journeyed to Washington, where he arrived July 1, 1956. He then proceeded to do everything possible to ascertain "what was happening at the Commission," and he retained the services of a number of persons to prevail upon the Commission to adhere to its previous determination and instructions to award the grant to JBC. Stockton desired that the Commission be convinced, by means of the intervention of persons high in political circles, that it should not permit off-the-record representations or political influence to affect this decision. However, he displayed no reluctance to attempt to dispatch emissaries to communicate his wishes to the Commission ex parte, and, in his own words, he "attempted to bring influence to bear upon the Commission [through the help of anyone I thought might help] by means other than through the recognized and public process of adjudication."

22. Earlier, in January of 1956, Stockton had availed himself of the services of J. J. Daniel, a former associate of Commissioner Mack at the Florida Railroad and Public Utilities Commission, to visit Mack in Washington and request him to expedite the final decision in the case. In July of 1956, Stockton again turned to Daniel as an emissary to Mack to advise the Commissioner of the prevalence of rumors that politics were to be involved in the Jacksonville decision. Daniel traveled to Washington and visited with Commissioner Mack, who advised him that he had already made up his mind to vote for Florida-Georgia. In light of this remark, Daniel did not discuss the case further. He accepted from Stockton the sum of $200 for his services.

---

[22] Senator Smathers refused to accede to the request because he believed that such action on his part would indicate a preference for JBC in view of a rumor current at that time that the Commission had already instructed its staff to prepare a decision granting the JBC application.

[23] See par. 4 of findings.

23. On July 11, 1956, Stockton telephoned Kenneth C. Royall, a New York attorney, and subsequently Stockton and his associates met with Royall on two or three occasions. He was told of Stockton's concern that political considerations might influence the decision. Royall refused to make off-the-record approaches to members of the Commission. However, he did call on the chairman of the Republican National Committee to request that organization to refrain from asserting political influence in the case. He was told that the committee had not interfered in the matter and would not do so in the future.[24] Royall was paid $2,674.60 for his services.

24. In the latter part of July 1956, Stockton called on Bailey Walsh, a Washington attorney, with whom he discussed the political apprehensions aforementioned. As a result of their conversation, Walsh introduced Stockton to the late B. Carroll Reece, former chairman of the Republican National Committee, in order that Stockton might explain his reasons for believing that politics played a part in the Commission's decision upon these applications. Walsh also undertook certain investigations of the Florida-Georgia personnel. He was paid $3,600 for his services.

25. In furtherance of his plan aforementioned, Stockton also secured the aid of three other Washington lawyers, but it would appear from the record at least that they performed only routine legal or investigative functions for which they were paid a total of $8,233.97.

Additional matters

26. As heretofore found, oral argument in the proceeding was heard by the Commission en banc on February 6, 1956. Commissioner Richard A. Mack participated in the session. On the same date, and while the matter was sub judice before the Commission on the basis of the public

[24] It is to be emphasized that, although a number of contacts were made with prominent political figures in connection with this case, ostensibly to secure assurances of their neutrality, there is no evidence indicating that the individuals or organizations mentioned attempted to influence the outcome of the proceeding, or, except as specifically noted in these findings of fact, even established contact with any member of the Commission.

record and exceptions which had been filed to the initial decision of the presiding hearing examiner, Commissioner Mack made a long-distance telephone call to Francis P. Conroy, a Jacksonville lawyer and his personal friend, for the specific purpose of discussing the relative merits of the three applicants. Specifically, Mack inquired of Conroy whether he knew "the people" identified with these applications, and whether he was aware of anything the Commission ought to know "that would indicate * * * that the one side or the other was more qualified or more acceptable or more financially responsible." These, of course, were among the primary phases of the case which Mack and his associate Commissioners at the time were required by law to consider solely upon the evidence which had been presented into the public record. Conroy advised Mack that he knew "Jim Stockton and Bob Feagin" [of Jacksonville Broadcasting Corp.]; that the "other group I associated in my mind with Hodges and Brest [of Florida-Georgia Television Co., Inc.] and the Duval Engineering people"; and that "by reputation, they were all well organized financially." During the conversation, Conroy stated that "the sum and substance of the conversation was that I knew nothing about either one of them that would indicate one or the other was more desirable." Toward the end of this conversation, Conroy inquired whether the city of Jacksonville was "still in the picture," but the record does not reveal a response by Mack. He then informed Conroy that the Commission was "looking into" the matter, and requested him to "check around town" for "anything that you think the Commission ought to know that might reveal something about the qualifications of these people." Mack then told Conroy that he would call him again on the subject. This was done late in March of 1956, and Mack invited Conroy's attention to their previous conversation, and inquired as to whether he knew "anything now that might be helpful to the Commission?" Conroy advised him that he did not, as he had made no effort "to find out anything." These two long-distance telephone calls from Mack to Conroy were unsolicited, and Conroy was not connected in any way with any of the parties to the proceeding.

27. Charles H. Murchison, a member of the law firm

which represented Stockton for many years as well as his personal friend and business associate, had discussed the case with Stockton during its various stages and was aware of his concern with regard to political influences.[25] During the time the case was pending with the Commission for final decision, Murchison visited A. Sidney Herlong, Jr., Congressman for the Fifth District of Florida.[26] In the course of their discussion, he mentioned Stockton's concern as to politics in the Jacksonville case and the rumors on which it was founded. Congressman Herlong immediately telephoned Mack to ascertain the reason why the final decision was being delayed and to vouch for the principal stockholders of JBC, but Mack notified him that, prior to coming to Washington, he had promised "Mitch Wolfson," whom he described as a principal stockholder in Florida-Georgia and a longtime friend and former schoolmate, that he was going to help him secure the television facility in Jacksonville.[27] The conversation was then terminated.[28]

---

[25] Although one of Murchison's law partners represented JBC in connection with the original hearing on these applications, Murchison himself did not then represent the corporation in this matter and did not discuss it with his partner. However, he did appear as counsel for JBC in the remand proceedings.

[26] While Murchison was a member of the law firm representing JBC (see footnote 25, supra), only by the exercise of conjecture and surmise could it be found upon this record that his visit to Congressman Herlong on this occasion was at the behest of the corporate officials of JBC.

[27] At the time Mack made this statement, Mitchell Wolfson, a Miami Beach businessman, owned 5 percent of the Florida-Georgia stock. He was never a schoolmate of Mr. Mack, and, although he had encountered Mack in connection with that gentleman's service on the Florida Railroad and Public Utilities Commission, his relationship to him was casual to the point of being tenuous. He never contacted any member of the Commission in connection with this case, had no knowledge of any contacts made by anyone else, nor had any understanding with or promise from Mack with regard to the television channel involved in the proceeding.

[28] Commissioner Mack's statement to Congressman Herlong forms the basis of a finding only that he made the statement, and not as to its accuracy. With respect to Wolfson and Florida-Georgia, the statement is hearsay and incompetent to form the basis of a finding of fact. *Tri-State Broadcasting Co., Inc.* v. *FCC*, 96 F. 2d 564. Moreover, it is noted that the evidence on this record fails to establish any substantial connection between Mack and Wolfson, and, in fact, tends to discredit Mack's allegation as to their relationship (footnote 27, supra).

Conclusions

1. Preliminary to any determinations based on the foregoing findings of fact is a resolution of the question raised by Florida-Georgia Television Co., Inc., as to the Commission's jurisdiction to take action with respect to its permit or license in this proceeding, viz., under the governing law, should the proceeding be regarded as merely investigatory, or may the Commission now take effective action on the basis of this record? By its memorandum opinion and order released herein December 14, 1960 (FCC 60-1145; mimeo No. 9628), the Commission invited the parties to comment on the question in their proposed findings and conclusions.

2. Florida-Georgia contends that since no appeal was taken from the Commission's decision of August 31, 1956, granting its application, and since the Commission on its own motion took no action within the time provided for appeal, the decision became final and the Commission lost jurisdiction to reconsider it or to reopen the record; that action to revoke the grant may now be taken only pursuant to 47 U.S.C. 312;[29] and that because the instant proceeding has not been brought under the provisions of this statute, it is merely investigatory and cannot result in any action affecting the Florida-Georgia construction permit or license. While this party correctly recites the statutory provisions relating to the jurisdiction of the Commission, it ignores the inherent power of all bodies charged with the responsibility of adjudication to protect the integrity of their processes. The statutory scheme regulating the finality of the decisions of administrative agencies, such as the Federal Communications Commission, is analogous to the system of statutes and rules governing the finality of judicial judgments with respect to which it has been held that "* * * tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the

---

[29] This provides for the revocation of station licenses or construction permits under stated circumstances, and establishes basic procedures to be followed in such cases.

institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always await upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246. While these remarks were addressed to a situation involving a Federal court, and it is obvious that administrative agencies are not possessed of the multitude of powers inherent in courts, with respect to the necessity of maintaining the integrity of their processes, the two classes of adjudicatory bodies are indistinguishable. The validity of this observation is buttressed by the sweeping generalization of the Court's language quoted above.

3. Thus, it would appear that, in the absence of any specific prohibition in the statutes, the limitation contained in 47 U.S.C. 312 is intended to apply in situations other than those involving tampering with the basic processes of the Commission; that the Commission has inherent authority to reopen records and reconsider decisions when questions of fraud in the procurement thereof are presented, irrespective of how long after their procurement the possibility of fraud is ascertained; and, therefore, that the Commission has authority to take such action as may be appropriate in this proceeding with respect to the outstanding license for the operation of television station WFGA-TV, which is now held by Florida-Georgia Television Co., Inc.[30]

4. Moreover, it is noted that if the instant case were to be treated as merely investigatory with a view toward determination of whether the facts developed merit a subsequent revocation proceeding under 47 U.S.C. 312, the possibility of the revival and comparative consideration of the appli-

[30] No consideration has been given to the situation in which the jurisdiction of the Court has been invoked through the filing of an appropriate appeal from a Commission decision, and such decision has been affirmed by the Court. The question of whether, in such a situation, the jurisdiction to reopen the proceeding would be in the Court or the Commission is not here presented.

cations of city of Jacksonville and Jacksonville Broadcasting Corp. would be obviated. Assuming arguendo that this record warranted conclusions adverse to Florida-Georgia and favorable to either of the other applicants, exclusive adherence to the procedures established by 47 U.S.C. 312 could not result in the rendition of justice as between the parties. In that the inherent power of adjudicatory bodies to reopen judgments tainted with fraud is not a creature of statute, but a flexible power numbering among its purposes the awarding of substantial justice, it cannot be contended successfully that adequate relief is available under the existing statute. *Hazel-Atlas Glass Co., supra.*

5. With regard to the first of the issues for determination, viz, whether any Commissioner who participated in the voting which resulted in a grant of the application of Florida-Georgia Television Co., Inc., should have disqualified hmself, it is here clearly established by competent evidence that Commissioner Richard A. Mack should have done so, for he rendered himself ineligible and legally unfit for such participation. His long-distance telephone conversations with Francis P. Conroy of Jacksonville, Fla., during February and March of 1956, upon the merits of the three applications, while the proceeding was sub judice before him and his associate Commissioners, constituted a negation of the most elementary concepts of fair adjudication and a deprivation of the rights of the applicants to a decision from a completely impartial tribunal based solely upon the evidence developed in the public record. It is without significance here that the off-the-record information Mack received from Conroy may have been meager, for he called him on these occasions for the sole purposes of discussing improperly, viz, ex parte, the merits of the competing applicants and of obtaining extra record matter as to their qualifications. Thus, the determination is here compelling that, in failing to observe the required standard of judicial detachment and in demonstrating that he was wholly oblivious to the fundamental concepts of due process and fairplay, Commissioner Mack should have disqualified himself from participating with his associate Commissioners in any deliberations concerning the merits of the

three applications and in voting upon them. There was no occasion for any of the other Commissioners to disqualify themselves from voting upon these applications; nor are they ineligible to participate in this remand proceeding. Commissioner Hyde's conversation with Miles H. Draper and Harlan L. Kays was confined to routine procedural matters unrelated to the merits of the case, and nothing is here shown to have transpired which might reasonably have aroused the Commissioner's suspicions as to his visitors' propriety. Similarly, Commissioner Lee's impartiality was not compromised by his two conversations with Cyril C. Spades. This is particularly illustrated by his summary dismissal of the man from his office when, on his second visit, Spades first hinted a preference among the applicants in the case. Obviously, contacts of this type, where the Commissioner is unaware of any ulterior motives on the part of his callers or where he immediately forbids any attempt to discuss the merits of the case, cannot be deemed to require his disqualification.

6. The conclusion as to Commissioner Mack's disqualification requires a determination that the Commission's grant to Florida-Georgia Television Co., Inc., adopted August 29, 1956, was void ab initio. The parties to the proceeding were entitled to judgment on their proposals by a panel consisting entirely of impartial Commissioners, and the disability of one member of that panel renders the decision a nullity. The fact that Commissioner Mack's vote was not vital to the decision, for absent his participation the result would have been the same by a three-to-two vote, does not alter this conclusion, as it is impossible to gage the effect his views may have had on his fellow Commissioners who believed that he shared their role of impartial adjudicators. *Berkshire Employees Association of Berkshire Knitting Mills* v. *N.L.R.B.*, 121 F. 2d 235.

7. It is also concluded that in any further proceedings to be had in connection with the subject applications, both the city of Jacksonville and Jacksonville Broadcasting Corp. are disqualified from consideration because of attempts by individuals identified with them to influence the Commission through methods outside the recognized and

public processes of adjudication. Florida-Georgia Television Co., Inc., on the other hand, is not shown by the evidence to be disqualified from further consideration and nothing in this record may be held to reflect adversely on its application.

8. It is clear that J. Dillon Kennedy, who was the city commissioner of Jacksonville most intimately concerned with the prosecution of its application in this proceeding, abandoned the recognized and public processes of adjudication when he retained the services of Miles H. Draper and gave him a carte blanche to "neutralize" supposed political pressures in Washington. The city of Jacksonville was represented of record by experienced and competent communications counsel well able to protect all of its interests through the public processes of adjudication. Draper's employment was solely for the sake of his supposed political influence, and the fact that he apparently had none to deliver does not mitigate Kennedy's purpose and intention in hiring him. Nor is Kennedy exculpated by the fact that his agreement with Draper was never reduced to specifics, viz, the identity of the persons Draper was to see and what he was to do. Whether this omission was due to a misplaced delicacy resulting in a reluctance to require Draper to make known his contacts, or to a naive assumption that there was a well-recognized procedure in such matters with which Draper might be expected to be familiar, Kennedy, in effect, gave Draper unqualified and unlimited authority to utilize off-the-record methods to affect the outcome of the Commission's decision. The mere employment of Draper, under these circumstances, was itself an improper attempt to influence the Commission's processes of adjudication, and the futility of the act is a tribute to Kennedy's inaptitude rather than his innocence. In reaching this conclusion, Draper's testimony has been, in essence, accepted, and Kennedy's conflicting testimony has been rejected. While the substance of the detailed testimony presented by Draper indicates a disregard of the basic proprieties of adjudicatory proceedings not calculated to inspire confidence in him as a witness, the circumstantial evidence of his activities in Washington, which would have been totally without motive absent some agree-

ment with Kennedy, lends support to his statements. On the other hand, Kennedy's actions in the matter, including his disregard of Draper's letters and telephone calls which would be expected to have inspired an investigatory response had he not entered into the agreement, in addition to his ultimate payment of Draper's fee, are wholly inconsistent with his denial of the agreement and render his testimony incredible.

9. While no other individual connected with the city of Jacksonville knew of or ratified Kennedy's activities, the city canont escape the legal onus of these activities which were undertaken in its behalf. The innocence of the majority of the individuals associated with the city does not furnish cause for excusing or for the condonation of Kennedy's acts, *WOCO, Inc.* v. *FCC,* 153 F. 2d 623. Therefore, although the matter becomes moot with the withdrawal of the city's applications, it must be concluded in any event that this applicant is disqualified.

10. James R. Stockton, on behalf of Jacksonville Broadcasting Corp., endeavored to utilize ex parte techniques to induce the Commission to exercise its ultimate decisional authority to adhere to the original instructions given its staff to prepare a decision upholding the grant contemplated by the initial decision of the hearing examiner, irrespective of the significance which might be drawn by the Commission from its analysis of the evidence and the exceptions of the competing applicants and oral argument thereon. In his own words, he attempted "to bring influence to bear upon the Commission * * * by means other than through the recognized and public processes of adjudication." While the only direct approach to a member of the Commission made at his behest was that of J. J. Daniel to Commissioner Mack, Stockton's expenditure of considerable sums of money to secure introductions to politically prominent individuals and organizations can only be construed as an attempt to establish a conduit for off-the-record representations of his position to members of the Commission. It must have been obvious to him that elicitation of the support of the individuals to whom he was introduced could avail him nothing unless such support was communicated to the Commissioners whose votes would de-

termine the matter, and it is concluded that he sought out these men in an effort to secure their intervention on his behalf with members of the Commission. That the attorneys whom he retained, as well as the people to whom they introduced him, declined to intercede with the Commission does not exculpate Stockton, for, as with J. Dillon Kennedy, supra, it is the attempt itself and not necessarily the success or failure thereof which compels the finding of disqualification. An individual who has done what he can to subvert the recognized and public processes of adjudication is not to be excused because of the incidental failure of his efforts to bear fruit.

11. In reaching the above conclusion, consideration has been given to Stockton's contention that he did not seek preference for his own application, but only endeavored to secure a decision untinged with prejudice to him, and that he acted in what he regarded as self-defense founded upon a belief that similar tactics were being employed by his opponents. Such factors do not operate to reverse the conclusion of disqualification, for conduct which itself is inherently unacceptable cannot be condoned because the motivation of the individual engaged therein may have been less culpable than that of others similarly engaged. Stockton's belief as to his opponents' activities was founded on unproven rumors and surmise. He too had available the services of experienced and competent counsel to advise him as to appropriate remedies in the event any factual foundation for his fears could be established. His resort to off-the-record attempts to influence the decision was tantamount to an abandonment of the rights he sought to obtain from the Commission on behalf of Jacksonville Broadcasting Corp. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580.

12. In light of the conclusion as to the disqualification of Jacksonville Broadcasting Corp., the pending petition of this party to amend its application, filed May 8, 1961, must be denied. The amended applicant would be composed of the identical interests as the original corporation, and the disability here found would apply with equal force to the partnership entity proposed by the amendment. It

would be an exercise in futility to find that good cause exists to permit the amendment of an application to specify an entity which would be ineligible to receive the grant.

13. As indicated, this record would not warrant conclusions adverse to Florida-Georgia Television Co., Inc. While a considerable volume of circumstantial evidence was adduced concerning persons associated, or purported to be associated, with this applicant, such circumstances could not support basic findings or conclusions reflecting discredit upon it except by an unwarranted exercise of conjecture and surmise. While the acts of certain individuals may be construed as not inconsistent with an attempt to influence the Commission ex parte, they are as easily consistent with the actions of honest men, and such circumstances cannot be held to overcome the averments of innocence by this applicant. Nor is there satisfactory evidence of any direct contact between a member of the Commission and any principal of Florida-Georgia Television Co., Inc. (As noted at footnote 28, not only is Commissioner Mack's statement to Congressman Herlong incompetent to prove contact with Mitchell Wolfson, but the facts of record as to the relationship of the two men tend to discredit Mack's allegation.)

14. The circumstantial evidence concerning several individuals less closely connected with Florida-Georgia Television Co., Inc., fails to establish (1) that they attempted to influence the Commission's decision by improper means; or (2) that they were motivated in their actions by the principals of Florida-Georgia. Thus.

(*a*) The letter written to Commissioner Mack by Randall Chase, in July of 1955, cannot here be held to have been more than an expression of an opinion by an interested citizen; but even assuming arguendo its impropriety, there is no evidence to indicate that it was inspired or requested by the author's friend, George H. Hodges of Florida-Georgia Television Co., Inc., or anyone identified with this applicant, or that any principal of Florida-Georgia was aware that the letter had been written.

(*b*) Lester W. Foley's conversations with Commissioner Mack cannot be held to have significance under the issues, for there is no acceptable evidence indicating that anything improper was discussed; nor is there any competent evidence of record tending to connect the fact of these conversations with an instigation on the part of Florida-Georgia Television Co., Inc. It is not entirely clear from the record when Foley's engineering firm received its contract for preliminary survey work on the Florida-Georgia tower, but even if it predated the grant of this applicant's construction permit, only by the exercise of conjecture could such a fact be taken to establish that the contract was in reality a reward for an ex parte approach to Commissioner Mack or any Commissioner. This record casts no valid doubt on Foley's testimony that his visits to Mack were on unrelated matters.

(*c*) While the attempt of Cyril C. Spades to discuss the merits of the case with Commissioner Lee is not to be condoned, the record is barren of evidence tending to demonstrate that Florida-Georgia Television Co., Inc., or its principals, caused or were aware of the incident. Spades' preference for this applicant was the result of a personal political aversion to seeing the grant awarded to an applicant headed by an individual active in the political party to which Spades was opposed, and it was not occasioned by solicitation.

(*d*) Since there is no acceptable evidence that Guy L. Simmons approached anyone in connection with this case, a useful purpose would not be served by consideration of the matters relating to his business dealings with Florida-Georgia Television Co., Inc. Nor would the ultimate determination of the issues herein be advanced by consideration of the evidence as to Msgr. Maurice S. Sheehy, whose activities are shown to have been confined to the service of assisting personnel of this applicant in securing interviews with appropriate naval officials, and of urging two of the applicants to reconcile amicably their differences to the advantage of both.

15. Although a vigorous and conscientious investigation of Florida-Georgia Television Co., Inc., as well as its principals and its associates, was conducted on this record, no evidence was adduced which by any reasonable adjudicatory standard might be deemed as meriting an adverse conclusion with respect to that applicant.

16. In summary, the primary conclusions herein are that the Commission's original decision released August 31, 1956, granting the application of Florida-Georgia Television Co., Inc., for television facilities in Jacksonville, Fla., and denying the applications of City of Jacksonville and Jacksonville Broadcasting Corp. for the same facilities, was void ab initio, for it was rendered by a panel which included a Commissioner who was disqualified to vote upon these applications. It is further concluded that the two entities whose applications were denied are disqualified from consideration of their proposals in any further proceedings, due to their attempts to influence the decisions by means other than through the recognized and public processes of adjudication.

17. There remains the question of the disposition of the television facilities here involved. Although, as indicated, the original grant in the proceeding is void, in light of the fact that no impropriety on the part of Florida-Georgia Television Co., Inc., the grantee, contributed to such determination, public interest, convenience, and necessity will be served by authorizing the continued operation of the facilities by this applicant, pending such final disposition as the Commission may deem appropriate.

Accordingly, *It is ordered,* This 9th day of April 1962, that unless an appeal from this initial decision is taken by any of the parties to the proceeding, or the Commission reviews the initial decision on its own motion in accordance with section 1.153 of the rules, the grant of a television construction permit to Florida-Georgia Television Co., Inc., as embodied in the Commission's decision released August 31, 1956 (FCC 56-800; mimeo No. 34118), *Is void, and it is hereby set aside;* that City of Jacksonville and Jacksonville Broadcasting Corp. *Are disqualified* from receiving a grant of their applications; and that the pending petition

of Jacksonville Broadcasting Corp., filed May 8, 1961, to amend its application, *Is denied;* and

It is further ordered, That the operating authority of Florida-Georgia Television Co., Inc., for television station WFGA-TV on channel 12, Jacksonville, Fla., is continued in effect, pending further order of the Commission.

APPENDIX D

Sections 402(b), (g), (h) and (i) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq., provide as follows:

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(g) Time of hearing; procedure.

At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 1009(e) of Title 5.

(h) Remand.

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(j) Finality of decision; review by Supreme Court

The Court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

Section 10(e) of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1009(e) provides:

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of

statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(6116-8)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 18 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

Response Not Printed

No. [redacted] 678

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

JACKSONVILLE BROADCASTING CORPORATION,

Respondent and Cross-Petitioner.

PETITION FOR A CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES H. MURCHISON
Counsel for Jacksonville Broadcasting Corporation
850 Florida National Bank Building
Post Office Box 479
Jacksonville, Florida 32201

ULMER, MURCHISON, KENT
ASHBY & BALL
850 Florida National Bank Building
Post Office Box 479
Jacksonville, Florida 32201

Of Counsel

TABLE OF CONTENTS

OPINION BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTES INVOLVED 3

STATEMENT 3

REASONS FOR GRANTING THE WRIT:

1. Under its scope of review the Court of Appeals should have examined facts of record de novo 8
2. An examination of facts de novo would have disclosed disqualification of Florida-Georgia 11
3. An examination of facts de novo would have disclosed Jacksonville Broadcasting Corporation not disqualified . 14
4. The Court erroneously applied same double standard applied by Commission in appraising actions of Florida-Georgia and J.B.C. 16
5. F.C.C. General Counsel, after thorough investigation and after record was completed, urged disqualification of Florida-Georgia 17

CONCLUSION 20

CITATIONS

Cases:

Citizens TV Protest Committee v. FCC, 348 F.2d 56, 62 19

Clarksburg Pub. Co. v. FCC, 96 U.S. App. D.C. at 215, 225 F.2d 511, 515 19

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 84 L.ed. 656, 662 8

Federal Communications Commission v. Schreiber, 381 U.S. 279, 14 L.ed. 2d 383, 391 8

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 88 L.ed. 1250, 1256 10

SEC v. Chenery, 318 U.S. 80, 87 L.ed. 626 (1943) 10

SEC v. Cogan, 201 F.2d 78, 86 (9th Cir. 1952) 10

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580, 90 L.ed. 1447, 1452-53 10

WORZ, Inc. v. FCC, 268 F.2d 889 (D.C. Cir. 1959), 106 App. D.C. 14 5

Texts:

Davis Administrative Law, Sec. 28.21, pp. 112-113 (1958) . . . 11

Statutes:

Administration Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 . . . 3
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 3

Judicial Code:

28 U.S.C. 1254(1) 1

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 590

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

JACKSONVILLE BROADCASTING CORPORATION,

Respondent and Cross-Petitioner.

PETITION FOR A CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Florida-Georgia Television Company, Inc. (Florida-Georgia), Intervenor in the proceedings in the Court below, filed a Petition for Writ of Certiorari in this Court on September 20, 1965, seeking to reverse the decision of the Court below on grounds other than those set forth herein.

Jacksonville Broadcasting Corporation (J.B.C.) hereby petitions for a Cross Writ of Certiorari to review said decision of the Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported in Vol. 348 F.2d 75 (D.C. Cir. 1965). It is also reproduced and printed as Appendix A in said Petition filed by Florida-Georgia. The opinions of the Federal Communications Commission (F.C.C.) and of the Hearing Examiner are reported at 35 F.C.C. 401 and are printed as Appendices B and C in said Petition, and each of said three opinions is hereby incorporated herein by reference.

JURISDICTION

The judgment of the Court of Appeals became final on June 21, 1965. The jurisdiction of this Court is invoked under the authority of 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented by this Petition is:

Whether the Court of Appeals properly construed its statutory duty to review decisions of the Federal Communications Commission which involved ex parte action and influence by and on members of the Commission in behalf of an applicant for a television broadcast license:

1. When it accepted findings of fact made by the Commission as binding upon the Court in a case such as this where the hearing before the Commission grew out of the testimony before the Legislative Oversight Committee (LOC) and testimony before the Commission evidencing ex parte action on behalf of the original successful applicant. The principal issue involved prior official actions of the Commission itself challenging its very integrity and did not in any way involve or require the exercise of expertise on the part of the Commission.

2. When it erroneously failed to examine the undisputed facts of record (under the specific circumstances of this case) and thus erroneously adopted

the Commission's finding that the principals of Florida-Georgia had no knowledge of and did not condone, ratify and adopt the ex parte activities on its behalf and therefore was not disqualified to receive the award of Channel 12.

3. When it erroneously failed to examine the undisputed facts of record (under the specific circumstances of this case and thus erroneously adopted the Commission's finding that J.B.C. should be disqualified because it "attempted" to influence the Commission through third parties "to decide the case on its merits and not on political influence" even though not one of said third parties interceded with the Commission on J.B.C.'s behalf.

4. When it approved the use of an illegal double standard by the Commission in weighing the conduct of Florida-Georgia and J.B.C. in the original comparative hearing.

STATUTES INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, applicable to this Petition are set forth in Appendix D of Florida-Georgia's Petition and incorporated herein by reference.

STATEMENT

The facts of record upon which this Cross-Petition is based are as follows:

The original applications for a construction permit for a television station on Channel 12 in Jacksonville, Florida, were consolidated for comparative hearing by order of the Commission on January 6, 1954. These hearings opened on February 15, 1964, and after the record was closed on December 7, 1954, the Examiner issued an initial decision under date of April 4, 1955,

recommending the grant of the construction permit to J.B.C. Exceptions to this initial decision were filed on May 13, 1955. Commission counsel concurred with the Examiner in recommending that J.B.C. should be given the award. In February 1956 oral argument was held before the Commission and shortly thereafter the Commission issued instructions to its staff to prepare a draft decision granting the Channel 12 construction permit to J.B.C. The principals of Florida-Georgia[1] were aware of this action by the Commission. Between the time of the vote to prepare a decision in favor of J.B.C. and June 27, 1956, a number of ex parte representations were made to the Commission on behalf of Florida-Georgia. Nothing was placed on the record between the time of the oral argument in February 1956 and June 27, 1956, when the Commission had before it for the first time the draft decision which had been prepared in favor of J.B.C. "in accordance with its instructions." This draft was again considered at the July 5, 1956 meeting at which time the Commission ordered the preparation of a revised decision granting the application of Florida-Georgia. The Commission next considered the Jacksonville case on July 18, 1956, when the draft decision favoring Florida-Georgia was submitted. The Commission again voted to pass over both draft decisions and they were not again considered until a meeting of the Commission on August 29, 1956. At this time the Commission by 4 to 2 vote adopted the decision granting the license to Florida-Georgia and denying the applications of J.B.C. The Chairman of the Commission and one member dissented. This opinion of the Commission was not appealed from by J.B.C. because of the then serious illness of James R. Stockton, its President and principal stockholder.

---

[1] One of the three applications for Channel 12 (the other applicant, the City of Jacksonville, has long since withdrawn its application so will not again be referred to herein).

As a result of hearings subsequently held by the subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives (L.O.C.), it was brought out that while the original case was pending before the Commission a number of ex parte presentations regarding the comparative hearings were made to the Commission on behalf of Florida-Georgia. The Commission, when informed of this fact, undertook additional investigations[2] relating to such alleged ex parte activities and ordered that the record of the original Channel 12 hearing be reopened and that hearings be held on four separate issues. The two issues pertinent to this Petition were:

1. To determine whether any of the members of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 12 in Jacksonville.

2. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for Channel 12 in Jacksonville, directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceeding.

At the end of the hearings conducted by the Commission's Examiner[3] it was recommended to the Commission that:

---

[2] Commission order of July 29, 1960 (released August 2, 1960), which reopened the original comparative hearings.

[3] Unlike other cases remanded to the Commission (e.g. *WORZ, Inc. v. F.C.C.*, 268 F.2d 889 (D.C. Cir. 1959), 106 App.D.C. 14, the Commission did not select an independent "specially appointed hearing examiner" but designated one of its regular examiners to hear the case. An additional examiner (who did not participate in the hearings) was later designated to assist in preparation of the Initial Decision.

A. Commissioner Mack should have disqualified himself from participating in the original proceedings.

B. The grant to Florida-Georgia was void *ab initio* because of Mack's illegal participation.

C. The City and J.B.C. were disqualified from consideration in any further proceedings because of "attempts by individuals, identified with them to influence the Commission through methods outside the recognized and public processes of adjudication."

D. Florida-Georgia was not disqualified from further consideration and "nothing in this record may be held to reflect adversely on its application." (I.D. p. 19, par. 7; Tr. 6202, JA 375.)

The Commission's General Counsel[4], who had conducted the entire investigation on behalf of the Commission and who was the only party involved who interviewed all the witnesses and had access to their records (since much of the testimony was put into the record by way of written statements), *filed exceptions to the recommendation that Florida-Georgia should not be disqualified and in its brief to the Commission strongly recommended that Florida-Georgia should be disqualified.* (See infra, page 18.) As to George Hodges, one of Florida-Georgia's principals, *the Commission's general counsel stated, "the lack of candor and evasiveness which characterizes his entire testimony compel the finding that Hodges' exculpatory testimony is unworthy of belief and his denials of complicity must be disregarded in toto."* (p. 26, General Counsel's Brief)[5]

J.B.C. also filed exceptions to the Examiners' recommendations.

---

[4] Emphasis supplied throughout this Petition unless otherwise noted.

[5] For additional statements by F.C.C. General Counsel see infra, page 18.

After oral argument, the Commission issued its decision which substantially adopted the findings of the Examiners *and completely ignored the recommendation of its general counsel.* From this decision J.B.C. appealed to the United States Court of Appeals, District of Columbia Circuit. The Court of Appeals by a two to one vote affirmed the Commission's finding that the original award to Florida-Georgia was void *ab initio* due to the ex parte activities of Commissioner Mack. The Court reversed that part of the Commission's findings which again granted Channel 12 to Florida-Georgia. The Court held that due to the ex parte activities of other parties on behalf of Florida-Georgia, Florida-Georgia should not be given the award on the existing record. It, therefore, directed the Commission to receive new applications and to conduct a further hearing to determine who the recipient of the award of Channel 12 should ultimately be. The majority opinion accepted the findings of fact made by the Commission as to Florida-Georgia and as to J.B.C. (without any analysis of or reference to those facts) and affirmed the Commission's disqualification of J.B.C. The dissenting opinion, however, concluded that Florida-Georgia did have knowledge of the ex parte activities carried on in its behalf and (together with J.B.C.) should therefore be disqualified from further participation in any reopened hearing. The dissent also held that if Florida-Georgia was held not to be disqualified then J.B.C. should not be. The dissenting opinion sharply criticized the illegal double standard used by the Commission in judging the conduct of the applicants and the obvious lack of impartiality in appraising evidence during the proceeding.

This Cross-Petition for Certiorari is directed to the majority opinion and to that portion of the dissent holding J.B.C. disqualified.

REASONS FOR GRANTING THE WRIT

1. Under its scope of review the Court of Appeals should have examined facts of record de novo.

It is a well recognized principle of law that the Court of Appeals will not disturb the findings and conclusions of the F.C.C. (or any other administrative agency) *where the action of the F.C.C. is clearly within the application of its expertise in administering the act under which it was established.* There are valid reasons for this well established principle.[6] Even though this is true, there are still exceptions which if they exist enable the injured party to seek reversals of F.C.C. by the Court of Appeals. Furthermore, this case does not come within the above general principle. The principles enunciated in the *Pottsville* and the *Schreiber* cases are wholly inapplicable to this case. Those cases (and other like cases cited by Florida-Georgia in its Petition) deal specifically with instances involving the expertise attributed to the Commission in administering the act. The question here does not involve such ex-

---

[6] As this Court recently held in *FCC v. Schreiber*, 381 U.S. 279, 14 L.Ed. 2d 383, 391:

"In the Pottsville Broadcasting case, this Court stressed, in upholding this delegation of broad procedural authority, the established principle that administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' 309 US, at 143, 84 L ed at 662. This principle, which has been upheld in a variety of applications, is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved."

pertise.[7] Furthermore, the Administrative Procedure Act specifically says that the Court of Appeals "shall hold unlawful and set aside agency action, findings and conclusions found to be * * * unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." (Section 10(e); Florida-Georgia's Petition, App. B, p. 80.) *Where, as here, you have a situation in which the F.C.C. itself was and is on trial under the first issue of the case, it is urgently necessary that the court not accept the findings of fact by the Commission but should review the facts de novo to determine whether justice has been done.* Since the number one issue (supra, p. 5) involved the possible disqualification and the integrity of the Commission, its determination of the weight to be given to the evidence should be scrutinized critically rather than accepted blindly by the reviewing Court.

The dissent below recognized the general rule by saying, "I agree with the broad proposition relied on by my colleagues that our scope of review of Commission action is limited." (p. 12, Judge Burger's dissent; Florida-Georgia's Petition, App. A, pp. 32-33.) However, the dissent then emphasized the point the majority opinion overlooked by stating that "the instant situation goes to the integrity of the Commission's processes in a fundamental manner. * * * *When a regulatory agency so far departs from protecting the public interest, some means must be found to ventilate the proc-*

---

[7] Here we have the all important question as to how broad is the scope of the reviewing Court's authority in cleansing decisions of the Commission which are tainted with improper ex parte actions by one of its own members as well as by persons acting in behalf of the successful applicant. This question, involving as it does the integrity of the Commission as well as the integrity of its decisions, necessarily brings into play an extraordinary broadening of the Court's scope of review.

esses employed." (fn.1, p. 12 dissent; Florida-Georgia's Petition, App. A, p. 32).[8]

The entire body of law relating to cleansing our judicial and administrative bodies of ex parte activity has been developed by the courts (*Universal Oil Products Co. v. Root Refining Co.*, supra fn.7), not by the administrative agencies. As the Ninth Circuit aptly held in a case involving the SEC's judgment on the question of fiduciary duty,

> "The able and learned district judge was, we think, as well qualified to pass upon what are the proper standards . . . as was the Commission. If any 'expertise' was involved, it belonged to the district judge . . ." *S.E.C. v. Cogan*, 201 F.2d 78, 86 (9th Cir. 1952).

The problem here is one involving an analysis of "broad equitable principles" in which the Court need not defer to any administrative solution. See *S.E.C. v. Chenery*, 318 U.S. 80, 87 L.ed. 626 (1943). If the Court is compelled to accept without question (and without a thorough review of the facts) the findings of the Commission in a case such as this, then the right of appeal is a hollow mockery bordering on a farcical waste of the time of all parties involved. The Appellant's apparent right of appeal to the Court would afford him no

---

[8] *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580, 90 L.ed. 1447, 1452-53.
". . . tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. *It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.* Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. *The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."* *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.ed. 1250, 1256.

protection of his rights to fair play and even-handed treatment so essential to the administration of justice in a case where the facts of record upon which the Commission's conclusions are based are of paramount importance and where the expertise of that administrative body is not in any sense involved.

Such critical scrutiny in situations of this kind provides the only adequate way in which abuse of the administrative processes may be properly "ventilated." One well recognized authority has aptly stated:

> "Experience has now proved that judicial review impairs an administrative program *only when the review involves undue substitution of judicial for administrative judgment on problems within the agency's special competence." Davis Administrative Law*, Sec. 28.21, pp. 112-113 (1958).

The majority opinion was therefore in error in stating, "We accept their findings under the rule applicable to the scope of our review." (Florida-Georgia's Petition, App. A, p. 30, par. IV.)

2. An examination of facts de novo would have disclosed disqualification of Florida-Georgia.

Petitioner is well aware of the fact that neither the Court of Appeals nor this Court, will, under normal circumstances, review the facts of record involved in an administrative hearing. However, this Petition is not directed to the normal situation involving the expertise of the administrative body in administering the act.

This case requires (because the integrity of the administrative body is the basic issue) that the Court review the evidence and weigh specific facts of record in order to properly determine whether justice has been done.

For these reasons it becomes necessary to present to this Court as a basis for granting this petition, a few of those facts showing the flagrant ex parte activities of the principals of Florida-Georgia and those acting on

behalf of the principals of Florida-Georgia. Because, if the Court below had correctly considered the facts of record, it would have been forced to conclude that Florida-Georgia was disqualified.

The record before the Court of Appeals contained unchallenged and undisputed testimony showing that George Hodges, one of the principal stockholders of Florida-Georgia, as well as a director of Florida-Georgia, and the individual "charged with the responsibility of prosecuting the application for Florida-Georgia," received a written communication from Monsignor Sheehy (who had been requested to help with Florida-Georgia's application)[9] wherein, among other things, Monsignor Sheehy stated that George Hodges "had sought his help" and he advised Hodges that "I met a *member of the FCC* while traveling to Detroit last week and he indicated that this would be a happy solution as far as the Commission is concerned." (FCC Ex. 54, Tr. 7519, JA 310v.) Even Florida-Georgia's brief filed before the Court of Appeals admitted that such a letter was written:

> "On July 23, 1965, Monsignor Sheehy addressed a letter jointly to Mr. Stockton and Mr. Hodges in which he repeated in writing the suggestion that they merge their interests, and he reported his conversation with the Commission 'member.' (R. 5766)" (p. 31, Intervenor's Brief in the Court below).

In addition to this direct uncontradicted (in fact admitted) testimony, there were other definite facts testified to showing conclusively that Florida-Georgia did have knowledge of and did ratify and condone the repeated ex parte activities on its behalf!

---

[9] Sheehy told three witnesses that he had been requested to help George Hodges with his Channel 12 application and that he was helping him with the Commission. Each of these witnesses so testified and their testimony was not contradicted by Sheehy or any other witnesses. (FCC Exs. 70-71, 75; Tr. 5774-75, 5786; JA 321-322, 326iv.)

Congressman Herlong testified that in a conversation with Commissioner Mack, Mack told him, "I promised Mitch Wolfson[10] a long time ago – not a long time ago – before I came up here that I was going to help him on this thing, this Channel." (Tr. 7095, JA 694.)[11]

The record showed that Congressman Herlong, a close personal friend of Commissioner Mack, was so shocked by this brazen admission that he (Congressman Herlong) reported it immediately thereafter to Chairman Harris of the LOC. Nothing can be added to the excellent treatment of this point in the dissent. (pp. 13-15 dissent; Florida-Georgia's Petition, App. A, pp. 33-35.)

The record showed that Lester Foley and C. C. Spades were actively helping Florida-Georgia with the Commission. Diary entries of Commissioner Mack showed that on two separate occasions between February and July 1956 (the critical period during which the Commission changed its vote favoring J.B.C.), Foley visited Mack to talk with him about the "Jax case." (Tr. 5891-92; JA 345.)

The record showed that Alfred Jones (a stockholder and director of Florida-Georgia) told F.C.C. General Counsel that "George Hodges had told me (Jones) that Foley and Spades were helping with the television application." (Tr. 7038-39; JA 679-680).

The record showed that Potter (Foley's construction engineer) testified that Foley had told him that "he was receiving a contract from Florida-Georgia because he had helped Florida-Georgia secure its television license." (Tr. 6899; JA 643.)

---

[10] Predominant stockholder and director of Florida-Georgia.

[11] "The commission was therefore faced with solid and credible evidence from a member of Congress that he had been told by Mack of an obviously illegal advance commitment to support the Intervenor regardless of the evidence." (p. 14 dissent; Florida-Georgia's Petition, App. A, p. 34.)

The majority opinion completely ignored every word of the above quoted testimony and did not mention any of it. This was because of its erroneous conclusion that it was required to ignore it by its scope of review ("We accept their findings under the rule applicable to the scope of our review") and by its erroneous conclusion that the action of the Commission "was altogether within its responsibility *to administer the statute in the public interest.*" This case does not involve the "administration" of the Act. It involves the actions and integrity of the Commission. The Court was not limited in the scope of its review of the facts of record.

3. An examination of facts de novo would have disclosed Jacksonville Broadcasting Corporation not disqualified.

The above facts show clearly Florida-Georgia's knowledge and acceptance of ex parte activity on its behalf which should have resulted in disqualification of Florida-Georgia. On the other hand, if the Court below had correctly considered the facts of record relative to J.B.C., it would have been forced to conclude that J.B.C. was not disqualified. The sole basis upon which the Commission, and subsequently the Court below, found J.B.C. disqualified was predicated upon the completely erroneous finding of the Commission, erroneously adopted by the Court, when it said:

> "The evidence of record amply supports the findings of the Commission that this applicant through its President, who was a controlling stockholder and director, in the language of the examiners, adopted by the Commission, sought outside influence, to induce the Commission to exercise its ultimate decisional authority to adhere to the original instructions given its staff to prepare a decision upholding the grant contemplated by the Initial Decision of the Hearing Examiner, *irrespective of the significance which might be drawn by the Commission from its analysis of the evidence and the exceptions of the competing appli-*

cants and oral argument thereon." (par. I, Majority Opinion; Florida-Georgia's Petition, App. A, p. 27.)

There is not one word of testimony in the record to support this finding. The Court's failure to examine the facts of record again caused it to adopt an erroneous finding of the Commission. *The only testimony of any kind bearing on J.B.C.'s ex parte attempt was the following testimony given by Mr. Stockton, the president and principal stockholder of J.B.C.*[12]

> "As a result of information which I received from Father Sheehy I actively continued my efforts to attempt to persuade, through other (I, personally, made no direct contact with any member of the Commission) the members of the Federal Communications Commission not to decide this case against Jacksonville Broadcasting Corporation because I had supported Adlai Stevenson for President, *but to decide it solely upon the merits of the case.* * * * To this extent (and for the purpose just stated, to wit: to attempt to persuade the Commission not to decide the case against Jacksonville Broadcasting Corporation because I had supported Adlai Stevenson for President, *and to decide the case solely upon the merits*) I attempted to bring influence to bear upon the Commission * * *." (Tr. 5787, JA 329).

This testimony furnishes no possible basis for holding that J.B.C. had even "attempted" to influence the Commission "irrespective of the significance which might

---

[12] Prior to any activity of any kind by Stockton, he had been told (and the undisputed facts of record show) that the Commission in the original comparative case, after analyzing the evidence and after hearing oral argument, had decided in favor of J.B.C., but that thereafter, without any additional evidence being placed on record, the Commission was changing its vote *as a result of the ex parte activities on behalf of Florida-Georgia.* The Court below found that such ex parte activities had taken place on behalf of Florida-Georgia.

be drawn by the Commission from its analysis of the evidence and the exceptions of the competing applicants and oral argument thereon."

Quite to the contrary, the Commission expressly found that no one J.B.C. so requested contacted the Commission on behalf of J.B.C.[13]

4. The Court erroneously applied same double standard applied by Commission in appraising actions of Florida-Georgia and J.B.C.

The twisted and forced connotations which the Commission placed on J.B.C.'s actions (resulting in no contacts on behalf of J.B.C.) while overlooking or excusing the repeated and rampant ex parte contacts made on behalf of Florida-Georgia constituted an erroneous application of an arbitrary double standard. This fact was most forcefully enunciated in the dissenting opinion:

> "But here the Commission has made a finding that one applicant is disqualified while another is given a 'clean bill' *in the face of evidence of ex parte contacts by the successful party at least as offensive as — and in my view worse than — those penalized by the Commission.* My conclusions on 'comparative misconduct' are not based on a reevaluation of credibility of witnesses, *for appellate judges are not free to engage in such excursions; credibility is for fact finders.* Rather my conclusions rest on undisputed evidence; * * * The testimony of Congressman Herlong as to Commissioner Mack's statements to him stands unchallenged; the Commission did not in any way cast doubt on Herlong's testimony. Mitchell Wolf-

---

[13] "That the attorneys whom he retained, as well as the people to whom they introduced him, declined to intercede with the Commission does not exculpate Stockton, for it is the attempt itself and not necessarily the success or failure thereof which compels the finding of disqualification." (I.D. p. 21; Tr. 6203-4; JA 377-378.)

son's testimony can do no more than afford a basis for a finding — if he was believed — that he, Wolfson, secured no ex parte commitment from Mack. * * *

"I repeat that I would not venture to balance the misconduct of Appellant against that of Intervenor for the purpose of giving the award to Appellant rather than Intervenor, But I can find no record basis for the Commission to hold that the rather bumbling and naive efforts of Appellant to find out who was 'undermining its award' was evil beyond redemption, while Intervenor was blameless. *Under a single standard of conduct both Appellant and Intervenor — or neither — should have been disqualified.*" (pp. 15-17; Florida-Georgia's Petition, App. A, pp. 35-36.)

5. F.C.C. General Counsel, after thorough investigation and after record was completed, urged disqualification of Florida-Georgia.

The Court below and counsel for Florida-Georgia in its brief to the Court *emphasized that the Examiner had the benefit of observing the witnesses while they were testifying and, therefore, the Examiners' conclusion should be given added weight.* The Examiners did not have the benefit of observing more than 50% of the witnesses. The record shows that the only party to this entire proceeding who had the benefit of interviewing and observing all witnesses was the F.C.C. office of general counsel. (O.G.C.) O.G.C. was charged by the Commission with the responsibility of developing and conducting this case on behalf of the Commission. Much of the sworn testimony subsequently introduced before the Examiner was in writing and was secured and approved by O.G.C. The individual witnesses in those cases were excused from appearing in person before the Examiner. It is, therefore, vitally important to have the benefit of O.G.C.'s opinion as to all witnesses and as to the weight that should be given to their testimony (whether it was given in person or in writing). The following constitute a few pertinent ex-

cerpts from the brief of O.G.C. (relative to the Florida-Georgia ex parte activities) filed before the Commission:

> "All of the foregoing *compels* the conclusion, *beyond any reasonable doubt,* that the Foley and Spades visits to Mack in April, May and June, 1956, and January, 1957, *were in connection with and on behalf of the Florida-Georgia application and that George Hodges knew of and fostered these activities.*
>
> *"The record also reflects Foley's efforts on behalf of Florida-Georgia in the uncontradicted testimony of Alan Potter,* a former Beiswenger-Hoch employee, that during the middle months of 1956 Foley had told him that the firm would probably receive some business from Florida-Georgia because of Foley's friendship with Hodges and Foley's efforts in behalf of the Florida-Georgia application (Ex. 35). *And Hodges' knowledge of these activities is reflected not only by the Sheehy letter but also by the statements which Alfred Jones admittedly made to Commission staff in May, 1960, to the effect that he had been given to understand by Hodges that Foley and Spades were helping with the Florida-Georgia application* (Ex. 72)." (O.G.C.'s Brief to Commission, pp. 43-44).
>
> "It is also clear, however, that a full and proper consideration of the evidentiary record will establish not only the improper conduct of Foley, Spades, Simmons, and Chase, *but also that George Hodges is inextricably* tied in with such conduct." (O.G.C.'s Brief to Commission, p. 55).
>
> "The culpability of Florida-Georgia must, of course, follow from the complicity of Hodges in these ex parte approached on its behalf. Further, Alfred Jones, a director and stockholder of Florida-Georgia, knew of Foley and Spades' improper activities from Hodges (Ex. 75)." (O.G.C.'s Brief to Commission, p. 56).

O.G.C. strongly urged and recommended that Florida-Georgia be disqualified. Yet on the face of these strong statements and recommendations by O.G.C. (borne out by the record), the denials and the contradictory statements, of the principals and agents of

Florida-Georgia were blandly accepted by the Commission and, thereafter, were not examined or mentioned by the Court below because of its erroneous belief that it was prohibited from doing so by its "scope of review."

On the other hand, the President of J.B.C.'s honest statements have been twisted into unrecognizable form although there was a complete absence of evidence contradicting his testimony.

If the integrity of the administrative process is to be preserved, it can only be done by applying the same standard to all parties alike. The majority opinion committed a grievous error in not doing so. The dissenting opinion in the Court below accurately characterized the Commission's rejection of undisputed evidence against Florida-Georgia as "astonishing sophistry! Indeed what impertinence!" In relation to this evidence the dissenting opinion stated, "the Commission is not bound by such nice evidentiary distinctions and indeed does not ordinarily stand on them; it is permitted — in fact *required* in the public interest — to consider reliable evidence which might be admissible in court."[14] (p. 16, fn.4, dissent; Florida-Georgia's Petition, App. A, pp. 35-36.)

It is clear, therefore, that the Commission used a double standard in admitting evidence and drawing conclusions therefrom and in refusing to give appropriate similar weight to evidence regarding the conduct of J.B.C. and Florida-Georgia.

---

[14] In *Citizens TV Protest Committee v. F.C.C.*, the Court below emphasized this very point:
"* * * 'However unwittingly, the Commission seems to have assumed the defense of its grant, rather than the public interest, as its primary role in the proceedings.'" 348 F.2d 56, 62. See *Clarksburg Pub. Co. v. F.C.C.*, 96 U.S. App. D.C. at 215, 225 F.2d at 515.

CONCLUSION

This case presents a fundamental question involving the division of responsibilities between the F.C.C. and the Court of Appeals for the District of Columbia Circuit. The importance of the question here presented is pointed up by the fact that, in addition to this Petition, there are now pending three other Petitions for Certiorari involving the same fundamental question.[15] Each of these four Petitioners is asking this Court to define the *extent to which*, and the *limits under which*, the Court of Appeals for the District of Columbia can and must function when reviewing the action of F.C.C.

Three of the Petitions assert that the Court of Appeals exercised broader reviewing powers than those granted to it under the Administrative Procedure Act. These Petitions in effect request that "the proper administration of the Communications Act *requires that the limits of the Court of Appeals* function to review the Commission's efforts to cleanse its own processes *be definitely established.*" This present Cross-Petition on the other hand, shows that the *Court failed to exercise the authority and responsibility given to it under the Communications Act* by failing to examine de novo the facts of record where those facts bear directly upon the integrity of the Commission itself. These four Petitions thus show that the decisions of the Court below were inconsistent in theory and application, and if allowed to stand would leave the law in an unsatisfactory state.

This Court is, therefore, asked to review these conflicting theories and to settle once and for all important

---

[15] No. 204, *Mid-Florida Television Corp. v. F.C.C.*, October Term 1965; No. 500, *Halpern & Seltzer v. F.C.C.*, October Term 1965; No. 397, *United States v. American Broadcasting-Paramount Pictures, Inc.*, October Term 1965.

questions involving the construction of the Communications Act of 1934.

It is appropriate to point out that the Government (as represented by the F.C.C. and the Attorney General of the United States, as parties respondent) is not opposing the grant of the several requested writs, presumptively because it, too, desires to have this question of national importance concerning the respective roles of the federal courts and the F.C.C. (in cases involving illegal influence) settled by this Court.

Respectfully submitted,

CHARLES H. MURCHISON
Counsel for Jacksonville Broadcasting Corporation
850 Florida National Bank Building
Post Office Box 479
Jacksonville, Florida 32201

ULMER, MURCHISON, KENT,
ASHBY & BALL
850 Florida National Bank Building
Post Office Box 479
Jacksonville, Florida 32201

Of Counsel

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for a Cross Writ of Certiorari has been furnished each of the following counsel by United States Air Mail this day of October, 1965:

Warner W. Gardner, Lawrence J. Latto, William H. Dempsey, Jr., Esqs., Shea & Gardner, 734 15th Street, N. W., Washington, D. C. 20005

Bernard Koteen and Alan Y. Naftalin, Esqs., Koteen & Burt, 1000 Vermont Ave., N. W., Washington, D. C. 20005

Richard F. Wolfson, Esq., 316 North Miami Avenue, Miami, Florida

Attorneys for Florida-Georgia Television Company, Inc.

Henry Geller, Esq., General Counsel, and Daniel R. Ohlbaum, Esq., Associate General Counsel, Federal Communications Commission, Washington, D. C. 20025

Attorneys for the Federal Communications Commission

Hon. Thurgood Marshall, Solicitor General of the United States, Washington, D. C.

Attorney for the United States

_____

Charles H. Murchison